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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 14, 1988

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QUESTIONS PRESENTED

Starrett City is the nation's largest publicly-assisted housing community. Although it borders a black ghetto in Brooklyn, New York, its population is integrated: of some 17,000 residents, 63% are white, 22% are black, 8% are Hispanic and 5% are Oriental. This is no accident: it is the product of integration-oriented tenant selection.

The consequences are those which we all hope will flow from integration: the community lives in peace, the children's test scores are high, the crime rates are low.

The price is that, since blacks preponderate among applicants for Starrett City apartments, black families must wait longer than whites to rent homes.[1] But if Starrett City apartments were rented in order of application, the community would swiftly become segregated, and the benefits that have flowed from integration would be lost.

The courts below have ordered summary judgment compelling Starrett City immediately and totally to abandon its integration-oriented rental policies.

The issue here is of statutory construction only: the government makes no constitutional claim. The statute is the Fair Housing Act of 1968 ("the Act"). Section 3604 provides, in part, that it shall be unlawful

> (a) To refuse to . . . rent . . . a dwelling to any person because of race, color, . . . or national origin.

But Section 3608(a) charges the Secretary of Housing and Urban Development to

> . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

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1 Except for the elderly, where white applicants preponderate to the point that they must wait longer than blacks (Appendices [hereinafter "A."] K-19).

Senator Mondale, co-sponsor of the Act, said that its purpose was to "replace ghettos with truly integrated and balanced living patterns," 114 Cong. Rec. 3422 (1968). And this Court said in *Linmark Associates* v. *Willingboro*, 431 U.S. 85, 94 (1977), that, by this Act, "Congress has made a strong national commitment to promote integrated housing."

In light of these statutory provisions, these questions are presented:

1. Does the Act compel abandonment forthwith of Starrett City's integration-maintenance rental policies, despite the unquestioned good faith of the project owner and the approval of those practices by the Department of Housing and Urban Development ("HUD") and by city and state authorities, or are the policies of the Act better served by allowing Starrett City appropriate time to phase out integration-maintenance so that this integrated community may be preserved?

2. Is the summary judgment ordered below proper, or is Starrett City entitled to a trial at which it can prove its good faith, the widespread approval of its practices, and the consequences that will follow if those policies must abruptly be scrapped?

Or, most simply:

3. Shall the Act be applied in such a manner as to destroy the very model of the integrated community it was enacted to bring into being?

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STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Starrett City Associates, Starrett City, Inc., and Delmar Management Company[2] (collectively "Starrett City") ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on March 1, 1988.

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2 Petitioners list the following parent companies, subsidiaries and affiliates pursuant to Rule 28.1: Starrett City Associates is a New York limited partnership that owns Starrett City. The general partners of Starrett City Associates are: (a) Petitioner Starrett City, Inc., a Limited Dividend Housing Corporation organized under Article II of the Private Housing Finance Law of New York; and (b) Disque Deane. Petitioner Delmar Management Company ("Delmar Management") is the managing agent for Starrett City. Delmar Management is owned 50% by Grenadier Realty Corporation and 50% by HRH Construction Corporation, both of which are wholly-owned subsidiaries of Starrett Housing Corporation.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 840 F.2d 1096, appears beginning at page A-1 of the Appendices to this petition. The opinion of the United States District Court for the Eastern District of New York (Neaher, J.), reported at 660 F. Supp. 668, appears beginning at page F-1 of the Appendices.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1988. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied on April 7. A timely motion for a 30-day stay of the mandate of the Court of Appeals, pending application to this Court for a writ of certiorari, was granted on April 15, and the stay was extended for an additional 60 days on May 5, and then for a further 10 days on July 8. Petitioners' application to Justice Marshall of this Court for an extension of time until July 15 in which to petition for certiorari was granted on June 29. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1345 and 42 U.S.C. § 3613.

STATUTE INVOLVED

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631. Because of its length, we print the text in the Appendices beginning at page J-1.

STATEMENT OF THE CASE

Petitioners are the developers and managers of Starrett City, a rental housing development consisting of 46 high-rise apartment buildings on 153 acres in Brooklyn, New York (A. K-1). Financed by HUD and the State of New York, and given tax abatements by the City of New York, Starrett City was completed in 1974 (A. K-7-12, 17). It contains 5,881 apartments, housing more than 17,000 residents of 39 different nationali

ties (A. K-23). The tenants are people of middle income, with income ceilings fixed by federal regulation (A. K-10, 11). Starrett is a self-contained community, with two on-site public schools, an early-learning center, a recreation and community center, a medical center, a power station, a shopping center and eight parking garages (A. K-2, 30).

Starrett City is built on a garbage dump, adjacent to a black neighborhood plagued by crime and vandalism and studded with abandoned, boarded-up buildings (A. K-14). The project sits in the flight path of Kennedy Airport. It borders a junk yard, a heavily traveled highway and a pollution control plant. It is separated from nearby all-white neighborhoods by a stagnant creek (A. K-14).

Yet Starrett City is not only the largest publicly-assisted housing project in the United States, it is also a rarity in that it is successfully integrated: it is literally true that every floor of every building houses blacks, whites, Hispanics, Asians, young and old (A. K-19-20, 23).

Starrett City is a safe community; its crime rates are markedly lower than those of the surrounding area (A. K-89-91). Indeed, a 1985 study (not part of this record), sponsored by Starrett City and conducted by the Pennsylvania State University, showed Starrett to be one of the safest places to live in the United States. It is free of vandalism and graffiti (A. K-94-98). Most important, its integrated schools are among the top-performing schools in New York City—confirming the view that stable school integration affords lasting benefits and enhanced educational opportunities to all students (A. K-92-94).

In short, Starrett City is a success. And its success is the product of the integration-oriented rental policies which are here under attack.

There is no dispute on this record that, from the time Starrett City was first constructed, renting apartments on a first-come, first-served basis would have resulted in a segregated community (A. K-3, 4, 14, 18, 26, 54-52, 82). Nearly all initial applicants for apartments were black (A. K-14, 17). The project's

location and the lack of public transportation, coupled with the general trend of white movement to the suburbs, made Starrett City unattractive to many whites (A. K-14). Neither the addition of such suburban-style amenities as parks, pools and a security force, nor an affirmative marketing effort costing millions of dollars, drew large numbers of white applicants (A. K-16-18).

So petitioners have never rented apartments on a first-come, first-served basis. Initially in order to achieve integration, and then in order to maintain integration, petitioners have carefully apportioned apartments among whites, blacks, Hispanics, the elderly and other groups (A. K-18-20). While no one has ever been denied an apartment at Starrett City because of race or ethnic origin, minorities, on average, spend a longer time on the waiting list (A. K-2, 3).

That Starrett City would swiftly become segregated in the absence of integration maintenance cannot be—and is not in this record—denied. Minority applications for apartments consistently outnumber white applications by margins of up to 4-1 (A. K-24-26). Moreover, whites are over-represented among tenants moving out (A. K-26). Starrett City's expert filed an affidavit saying:

> . . . I think it is beyond question that, in the absence of effective occupancy controls, Starrett City would become an overwhelming minority development within a very short period of time . . . at least 80% minority within three to five years.

(A. K-8). The government's expert said that he could not be sure, but his arithmetic calculation was that it

> . . . would take approximately 5 years or more for the development to approximate the racial composition of its tenant waiting list [approximately 80% minority].

(A. K-104). To prevent this outcome, Starrett City has done what it has done; and it has thereby accomplished what it has accomplished.

At all times, the federal, state and city governments knew of and approved Starrett City's practices (A. K-3, 9, 12, 13, 15, 18, 31-33, 34-35, 49-50). Robert C. Rosenberg, who has managed Starrett City since 1973, says in his affidavit:

> From the outset, there was no question that both the federal and state governments wanted Starrett City to become and remain an integrated project. Officials of the New York State Division of Housing and Community Renewal ("DHCR") and the United States Department of Housing and Urban Development ("HUD") discussed the subject of integration with Starrett City's representatives and left no doubt that they wanted Starrett City to do what was necessary to rent the development on an integrated basis. Representatives of DHCR and HUD visited the development on numerous occasions during the rent-up period, and they were fully informed of the measures being employed by Starrett City to achieve an integrated tenant population. Starrett never would have undertaken its tenant selection practices had it not been for the active support and encouragement of the state and federal governments.

(A. K-3). The government does not disagree.

Starrett City's policies have not gone without challenge in the courts. In 1979, a class of black plaintiffs on the waiting list at Starrett City, represented by the N.A.A.C.P., filed an action asserting that the rental policies were barred by the Fair Housing Act and the Constitution, *Arthur, et al.* v. *Starrett City Associates, et al.*, 79 Civ. 3096 (E.D.N.Y. filed Dec. 5, 1979) (A. K-20). The petitioners here were made defendants, as was the DHCR.

In May 1984, after five years of litigation and negotiation, the parties hammered out a settlement (reprinted in full as Appendix I) that was designed to address, not only the issues raised by the complaint, but also the broader problems of the shortage of housing for minorities throughout New York City and the fact that many other publicly-assisted projects in New York City were all-white or nearly so (A. I-7). Starrett agreed to in-

crease the apartments occupied by black and Hispanic families from 28.8% to 31.8% over a five-year period, (A. I-7) while the DHCR agreed to increase minority occupancy at other New York City developments to the end that all DHCR developments would have at least 20% minority occupancy within 15 years (A. I-9). The DHCR agreed also to give preference at these largely-white projects to minority applicants from Starrett City's waiting list (A. I-15). All parties acknowledged that their ultimate goal was an integrated Starrett City which would not need integration-maintenance practices (A. I-7).

Although it had refused to join in the *Arthur* litigation, the United States promptly sued petitioners (but not the DHCR), alleging that Starrett's rental practices violated the Fair Housing Act (but not the Constitution). The government moved for summary judgment and petitioners cross-moved.

Somewhat remarkably, the district judge who had approved the *Arthur* settlement granted the government's motion for summary judgment, ruling that Starrett's integration-maintenance program violated the Fair Housing Act despite the program's integrationist purpose (A. F-20).

On appeal, a divided Second Circuit panel affirmed. Treating the Fair Housing Act as congruent with another anti-discrimination statute, Title VII, the majority (Miner, Altimari, JJ.) held Starrett City's practices unlawful because (1) "no definite termination date for Starrett's quotas is perceivable," and (2) there was no showing of prior racial discrimination adversely affecting whites, which, in the court's view, was necessary to justify any plan favoring white applicants—even a voluntary program adopted by a private party to foster integration (A. A-13). Finally, the majority held that, because Starrett City's plan operated as a "ceiling quota," it acted to the detriment of the very people for whom Title VIII was intended to open housing opportunities (A. A-13). The majority concluded:

> We do not intend to imply that race is always an inappropriate consideration under Title VIII in efforts to promote integrated housing. We hold only that Title VIII does not allow appellants to use rigid racial quotas of indefinite du-

> ration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them.

(A. A-16). Thus the majority apparently recognized that the policy objectives of Title VIII permit consideration of race in tenant selection—the majority just did not approve the way Starrett City does it. But instead of remanding for the structuring of relief which would recognize Starrett City's lawful objectives, the majority affirmed the judgment below that would swiftly segregate the community.

Judge Newman dissented. Noting the government's "close cooperation in the development of Starrett City as an integrated housing complex," Judge Newman said that the bringing and the timing of this action raised "a substantial question as to the Government's commitment to integrated housing" (A. A-20). The Fair Housing Act was never intended to strike down pro-integration measures, said Judge Newman:

> Title VIII bars discriminatory practices in order to end segregated housing. Starrett City is not promoting segregated housing. On the contrary, it is maintaining integrated housing. It is surely not within the spirit of the Fair Housing Act to enlist the act to bar integrated housing. . . . A law enacted to enhance the opportunities for people of all races to live next to each other should not be interpreted to prevent a landlord from maintaining one of the most successful integrated housing projects in America.

(A. A-22-23). At a minimum, Judge Newman believed Starrett was entitled to a trial on the need for its integration-maintenance policy (A. A-27).

Their petition for rehearing having been denied, petitioners apply to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW DEALS WITH IMPORTANT QUESTIONS THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Few social problems have proved as intractable as achieving meaningful integration in American housing, and few carry as much portent for our nation's future. The Fair Housing Act was the nation's response to the 1968 report of the Kerner Commission, with its famed warning that

> Our nation is moving toward two societies, one black, one white—separate and unequal.

Today, in housing at least, that dire prediction is realized truth.

Starrett City is a rare, successful effort to reverse this terrible fact. This Court has never squarely considered whether such efforts are barred or encouraged by the Fair Housing Act. So critical a question of law, with such a manifest and dramatic impact on our nation, should not be finally determined without review in this Court.

The Questions Presented by This Case

Read literally and out of the context of its history and purpose, Sections 3604(a)-(d) of the Fair Housing Act, which Starrett City is accused of violating, would seem to prohibit race-conscious rental practices, regardless of their beneficient purpose.

But this Court has so often ruled that it is wrong to read the letter of a law without attending to its spirit. *See, e.g., Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). And, most specifically, in *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), this Court declined to adopt a literal reading of Title VII of the Civil Rights Act, which bars discrimination in employ-

ment, so as to forbid private employers from voluntarily adopting affirmative action plans that accord racial preferences to blacks. Viewed in light of the Congress's primary concern in enacting Title VII, which was to improve "the plight of the Negro in our economy," the Court held that "reliance upon a literal construction of [Title VII] is misplaced" because the race-conscious practices under challenge were "voluntarily adopted by private parties to eliminate traditional patterns of racial segregation" (443 U.S. at 201) (Title VII of the Civil Rights Act of 1968, § 2000e-2, is reprinted in the Appendices beginning at page J-8).

So here, the question on which petitioners seek review is whether Title VIII of the Civil Rights Act forbids Starrett City from voluntarily employing race-conscious measures to achieve and maintain integration in a housing project that would surely be segregated but for affirmative efforts to preserve its multiracial character. That question, we submit, is no less worthy of review under Title VIII than it was under Title VII.

The face of the Fair Housing Act as a whole makes it clear that Congress intended to do more than simply prohibit discrimination in housing, which is all the literal language of Section 3604 addresses. Rather, as we have seen, the Act directs the Secretary of Housing and Urban Development to administer the statute *affirmatively* in order to effect its underlying policies, 42 U.S.C. § 3608(d). That section has been broadly interpreted to uphold policies that achieve, and condemn policies that defeat, "the goal of open, integrated residential housing patterns and . . . prevent the increase of segregation. . . ." *Otero* v. *New York City Housing Authority*, 484 F. 2d 1122, 1134 (2d Cir. 1973). As the First Circuit observed last year, "every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating." *NAACP* v. *Secretary of HUD*, 817 F.2d 149, 155 (1st Cir. 1987).[3]

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3 *See. e.g.*, *Huntington Branch, NAACP* v. *Huntington*, 844 F.2d 926, 935 (2d Cir. 1988); *United States* v. *Yonkers Board of Education*, 837 F.2d 1181, 1218-19 (2d Cir. 1988), *cert. denied*, _____ U.S. _____ (1988); *Anderson* v. *City of Alpharetta*, 737 F.2d 1530, 1537 (11th

As the dissent below recognized, the decision to enjoin Starrett City's integration-maintenance program, when it is certain that the project will become segregated once the program is abandoned, does violence to the spirit of the Fair Housing Act—violence that this Court alone can correct.

A subsidiary issue raised by the ruling below is whether the law of affirmative action developed under Title VII to deal with employment discrimination is so pertinent to the goals of the Fair Housing Act that the latter statute should be interpreted in complete congruence with Title VII. The majority below read into the Fair Housing Act a limit on the duration of any race-conscious measures adopted to promote integration. The majority derived this limitation from Title VII, which has been construed to permit only those voluntary race-conscious programs that are of limited duration (A. A-11-12).

But as Judge Newman observed in his dissent:

> Though Titles VIII and VII share a common objective of combating discrimination, their differing contexts preclude the assumption that the law of affirmative action developed for employment is readily applicable to housing.

(A. A-26n4). In particular, Title VIII has a much broader purpose than Title VII. As this Court has long recognized, the sponsors of Title VII explicitly disavowed the goal of creating any permanent racial balance in an employer's work force. *Local 28 Sheet Metal Workers Int'l. Assoc.* v. *EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 3039-43 (1986); *Steelworkers* v. *Weber*, 443 U.S. 193, 207 (1978). Therefore, courts have always refused to read into Title VII any obligation to maintain integration in the work force once it is achieved. *Ibid.* But the sponsors of the Fair Housing Act were determined that *this* statute be applied

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Cir. 1984); *Alschuler* v. *Department of HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Garrett* v. *City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Shannon* v. *Department of HUD*, 436 F.2d 809, 821 (3d Cir. 1970). *See also Barrick Realty Inc.* v. *City of Gary*, 491 F.2d 161, 165 (7th Cir. 1979) (integration policy of municipality).

to achieve *lasting* integration. As the Second Circuit said in *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973), Title VIII requires those who administer housing programs to do more than an employer is required to do under Title VII, *i.e.*, refrain from discriminating; rather, those who implement Title VIII must

> . . . take action to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.

This Court has never considered whether Title VIII ought to be analogized to Title VII. Specifically, it has never decided whether the limitations on affirmative efforts to integrate the work place under Title VII—limitations derived from the limited purpose of that law—ought to be similarly applied to efforts to integrate housing. That question is particularly worthy of review by this Court because integration of housing is critically different from integration in the workplace. Whites do not quit their jobs in large numbers in response to the hiring of minorities: Not one of the many Title VII cases considered by this Court has seen any such development. In contrast, it is a matter of sad fact that many whites *do* leave their neighborhoods when minorities arrive, replacing one kind of segregation with another. This difference alone would seem to undermine the wisdom of a rigid application of the law of affirmative action in employment to questions of affirmative action in housing.

Impact on Other Cases

Review of this case is required, we submit, not only in the interest of the more than 17,000 people who live in harmony in Starrett City, but also because of the impact the decision here will have on other cases.

Starrett City is by no means the only publicly-assisted housing project whose integration-maintenance program has been

challenged by the government. Since this action was filed in 1984, the Justice Department and HUD have demanded that dozens of publicly-assisted housing projects abandon integration-maintenance programs that were adopted with the knowledge and approval—and sometimes at the behest—of HUD.[4] Suits similar to this one have been brought against two other successfully-integrated projects: in Chicago, *United States* v. *Atrium Village Associates, et al.*, No. 87-C-6527 (N.D. Ill. filed Sept. 24, 1987), and in Charlottesville, *United States* v. *Charlottesville Redevelopment and Housing Authority*, No. 86-0033-C (D. Va. filed July 8, 1986).

The government has taken the position that the Second Circuit's opinion in this case compels judgment in its favor in these cases. Presumably, the government will sue all communities which do not voluntarily abandon integration maintenance.

Thus, unless reviewed and reversed by this Court, the Second Circuit's ruling is likely to result in a nationwide wave of segregation where integration has been carefully and honorably accomplished. True, other courts of appeals may differ with the Second Circuit. But then the issue will surely require resolution by this Court, and meanwhile Starrett City and other communities will have become ghettos.

The most pitiable victims, we must point out, will be the more than 2,500 school children of Starrett City. The community's fully-integrated public schools are practically unique in New York City, and the high performance level of their students attests to the success of integrated education—Starrett City children leave their schools educated (A. K-92). If Starrett is forced to become a segregated, all-minority community, its schools will follow suit, to the detriment of black and white children alike.

And, of course, if the decision below sets the pattern for the nation, and integrated communities everywhere become ghettos, the impact will be felt by children everywhere. Segre-

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4 This statement is based on discovery materials produced in *United States* v. *Charlottesville Redevelopment and Housing Authority*, No. 86-0033-C (D. Va. filed July 8, 1986).

gated housing creates segregated schools—which create crippled children.

II.

SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS WAS ERROR

In *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 247 (1986), this Court held that summary judgment could be granted where—and only where—there are no "disputes over facts that might affect the outcome of the suit under governing law." Where, as here, no discriminatory animus motivates voluntary race-conscious measures, petitioners are entitled to a factual determination on their claim that those measures are necessary. *See Parent Ass'n. of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 718, 720 (2d Cir. 1979), and *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1137 (2d Cir. 1973) (cases remanded for trial to determine whether plans were necessary to achieve integration and prevent an increase in segregation).

This principle ought to have precluded the entry of summary judgment against petitioners. Starrett City submitted extensive evidence that it would become segregated within five years if its race-conscious rental practices were enjoined at this time. That evidence—uncontradicted by anything in the government's meager presentation (printed in its entirety at A. K-101-104)—was so overwhelming that the dissenting panelist below believed it might have compelled summary judgment *in favor of petitioners* (A. A-27). At a minimum, it surely precluded the entry of judgment without a trial.

But the lower courts denied petitioners their trial. That denial was flatly inconsistent with Fed. R. Civ. P. 56, since it necessarily meant that issues of fact concerning the need for integration maintenance—and the need for time in phasing out integration maintenance in order not to destroy the community—were resolved on summary judgment. Such egregious error should surely not be allowed to stand in a case that raises important and sensitive issues of law and social policy.

CONCLUSION

In oral argument in the Court of Appeals, Assistant Attorney General William Bradford Reynolds stated the government's position starkly:

> We have neighborhoods across this land that are one race or predominantly one race and there is nothing that suggests that there is anything offensive with regard to that condition.

We submit that the Congress, in the Fair Housing Act of 1968, found "that condition" terribly "offensive."

We ask this Court, in consequence, to review and reverse the decision below.

Dated: July 14, 1988

Respectfully submitted,

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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 14, 1988

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1483—August Term, 1986

(Argued July 16, 1987 Decided March 1, 1988)

Docket No. 87-6132

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., DELMAR MANAGEMENT COMPANY,

Defendants-Appellants.

Before:

NEWMAN, MINER and ALTIMARI,

Circuit Judges.

Appeal from a summary judgment in favor of appellee entered in the United States District Court for the Eastern District of New York (Neaher, J.), enjoining the use of racial quotas in the rental of apartments and ordering appellants to institute nondiscriminatory tenant selection standards and procedures.

Affirmed.

Judge Newman dissents in a separate opinion.

WILLIAM BRADFORD REYNOLDS, Assistant United States Attorney General, Washington, DC (David K. Flynn, William R. Yeomans, United States Department of Justice, Washington, DC, Andrew J. Maloney, United States Attorney for the Eastern District of New York, Brooklyn, NY, of counsel) *for Plaintiff-Appellee.*

MORRIS B. ABRAM, New York, NY (Colleen McMahon, Michael G. Carey, Daniel L. Sosland, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, of counsel) *for Defendants-Appellants.*

MINER, *Circuit Judge*:

The United States Attorney General, on behalf of the United States ("the government"), commenced this action under Title VIII of the Civil Rights Act of 1968 ("Fair Housing Act" or "the Act") against defendants-appellants Starrett City Associates, Starrett City, Inc. and Delmar Management Company (collectively, "Starrett") in the United States District Court for the Eastern District of New York (Neaher, J.). The government maintained that Starrett's practices of renting apartments in its Brooklyn housing complex solely on the basis of applicants' race or national origin, and of making apartments unavailable to black and hispanic applicants that are then made availa-

ble to white applicants, violate section 804(a), (b), (c) and (d) of the Act, 42 U.S.C. § 3604(a)-(d) (1982).

The parties made cross-motions for summary judgment based on extensive documentary submissions. The district court granted summary judgment in favor of the government and permanently enjoined appellants from discriminating on the basis of race in the rental of apartments. Starrett appeals from this judgment.

BACKGROUND

Appellants constructed, own and operate "Starrett City," the largest housing development in the nation, consisting of 46 high-rise buildings containing 5,881 apartments in Brooklyn, New York. The complex's rental office opened in December 1973. Starrett has made capital contributions of $19,091,000 to the project, the New York State Housing Finance Agency has made $362,720,000 in mortgage loans, and the U.S. Department of Housing and Urban Development subsidizes Starrett's monthly mortgage interest payments. The United Housing Foundation abandoned a project to build a development of cooperative apartments at the Starrett City site in 1971. Starrett proposed to construct rental units on the site on the condition that the New York City Board of Estimate approve a transfer to Starrett of the city real estate tax abatement granted to the original project. The transfer created "substantial community opposition" because "the neighborhood surrounding the project and past experience with subsidized housing" created fear that "the conversion to rental apartments would result in Starrett City's becoming an overwhelmingly minority development." *United States v. Starrett City Assocs.*, 660 F. Supp. 668, 670 (E.D.N.Y.

1987). The transfer was approved, however, "upon the assurance of Starrett City's developer that it was intended to create a racially integrated community." *Id.*

Starrett has sought to maintain a racial distribution by apartment of 64% white, 22% black and 8% hispanic at Starrett City. *Id.* at 671. Starrett claims that these racial quotas are necessary to prevent the loss of white tenants, which would transform Starrett City into a predominantly minority complex. Starrett points to the difficulty it has had in attracting an integrated applicant pool from the time Starrett City opened, despite extensive advertising and promotional efforts. Because of these purported difficulties, Starrett adopted a tenanting procedure to promote and maintain the desired racial balance. This procedure has resulted in relatively stable percentages of whites and minorities living at Starrett City between 1975 and the present. *See id.* at 672.

The tenanting procedure requires completion of a preliminary information card stating, *inter alia*, the applicant's race or national origin, family composition, income and employment. The rental office at Starrett City receives and reviews these applications. Those that are found preliminarily eligible, based on family composition, income, employment and size of apartment sought, are placed in "the active file," in which separate records by race are maintained for apartment sizes and income levels. Applicants are told in an acknowledgement letter that no apartments are presently available, but that their applications have been placed in the active file and that they will be notified when a unit becomes available for them. When an apartment becomes available, applicants are selected from the active file for final processing, creating a processed ap-

plicant pool. As vacancies arise, applicants of a race or national origin similar to that of the departing tenants are selected from the pool and offered apartments.

In December 1979, a group of black applicants brought an action against Starrett in the United States District Court for the Eastern District of New York. The district court certified the plaintiff class in June 1983. *Arthur v. Starrett City Assocs.*, 98 F.R.D. 500 (E.D.N.Y. 1983). Plaintiffs alleged that Starrett's tenanting procedures violated federal and state law by discriminating against them on the basis of race. The parties stipulated to a settlement in May 1984, and a consent decree was entered subsequently, *see Arthur v. Starrett City Assocs.*, No. 79-CV-3096, slip op. at 1 (E.D.N.Y. April 2, 1985). The decree provided that Starrett would, depending on apartment availability, make an additional 35 units available each year for a five-year period to black and minority applicants. *Id.* at 10.

The government commenced the present action against Starrett in June 1984, "to place before the [c]ourt the issue joined but left expressly unresolved" in the *Arthur* consent decree: the "legality of defendants' policy and practice of limiting the number of apartments available to minorities in order to maintain a prescribed degree of racial balance." *United States v. Starrett City Assocs.*, 605 F. Supp. 262, 263 (E.D.N.Y. 1985). The complaint alleged that Starrett, through its tenanting policies, discriminated in violation of the Fair Housing Act. Specifically, the government maintained that Starrett violated the Act by making apartments unavailable to blacks solely because of race, 42 U.S.C. § 3604(a); by forcing black applicants to wait significantly longer for apartments than whites solely

because of race, *id.* § 3604(b); by enforcing a policy that prefers white applicants while limiting the numbers of minority applicants accepted, *id.* § 3604(c); and by representing in an acknowledgement letter that no apartments are available for rental when in fact units are available, *id.* § 3604(d). Because the government had refused to intervene in the *Arthur* suit, defendants moved to dismiss this suit as barred under the judicial estoppel doctrine. On April 2, 1985, this motion was denied. 605 F. Supp. at 265.

Following a period for taking discovery, the government moved for summary judgment on January 30, 1986. Defendants made a cross-motion for summary judgment on May 5, 1986. Extensive documentary submissions were made, and arguments on the motion were heard on August 26, 1986.

Starrett maintained that the tenanting procedures "were adopted at the behest of the [s]tate solely to achieve and maintain integration and were not motivated by racial animus." 660 F. Supp. at 673. To support their position, appellants submitted the written testimony of three housing experts. They described the "white flight" and "tipping" phenomena, in which white residents migrate out of a community as the community becomes poor and the minority population increases, resulting in the transition to a predominantly minority community. *See id.* at 674. Acknowledging that " 'the tipping point for a particular housing development, depending as it does on numerous factors and the uncertainties of human behavior, is difficult to predict with precision,' " one expert stated that the point at which tipping occurs has been estimated at from 1% to 60% minority population, but that the consensus ranged between 10% and 20%. *Id.* Another expert, who

had prepared a report in 1980 on integration at Starrett City for the New York State Division of Housing and Community Renewal, estimated the complex's tipping point at approximately 40% black on a population basis. *Id.* at 674-75. A third expert, who had been involved in integrated housing ventures since the 1950's, found that a 2:1 white-minority ratio produced successful integration. *See id.* at 676.

The court, however, accepted the government's contention that Starrett's practices of making apartments unavailable for blacks, while reserving them for whites, and conditioning rental to minorities based on a "tipping formula" derived only from race or national origin are clear violations of the Fair Housing Act. The district court found that apartment opportunities for blacks and hispanics were far fewer "than would be expected if race and national origin were not taken into account," while opportunities for whites were substantially greater than what their application rates projected. *Id.* at 672. Minority applicants waited up to ten times longer than the average white applicant before they were offered an apartment. *Id.* at 676. Starrett City's active file was 21.9% white in October 1985, but whites occupied 64.7% of the apartments in January 1984. Although the file was 53.7% black and 18% hispanic in October 1985, blacks and hispanics, respectively, occupied only 20.8% and 7.9% of the apartments as of January 1984. *Id.* at 672. Appellants did not dispute this. Further, the court found that appellants' tipping argument was undercut by the "wide elasticity of that standard" and the lack of difficulty they had in increasing their black quota from 21% to 35% "when it became necessary to avoid litigating the private *Arthur* lawsuit which threatened their unlawful rental practices." *Id.* at 678.

The court also found that Starrett violated the Act by making untrue representations of apartment unavailability to qualified minority applicants in order to reserve units for whites. *Id.* at 676. Finally, the court rejected Starrett's claim that the duty imposed upon government to achieve housing integration justified its actions, stating that "[d]efendants cannot arrogate to themselves the powers" of a public housing authority. *Id.* at 678.

The court concluded that Starrett's obligation was "simply and solely to comply with the Fair Housing Act" by treating "black and other minority applicants . . . on the same basis as whites in seeking available housing at Starrett City." *Id.* The court noted that Starrett did not dispute any of the operative facts alleged to show violations of the Fair Housing Act. *Id.* at 672, 678-79. Accordingly, Judge Neaher granted summary judgment for the government, enjoining Starrett from discriminating against applicants on the basis of race and "[r]equiring [them] to adopt written, objective, uniform, nondiscriminatory tenant selection standards and procedures" subject to the court's approval. *Id.* at 679. The court retained jurisdiction over the parties for three years. *Id.*

On appeal, Starrett presses arguments similar to those it made before the district court. We affirm the district court's judgment.

DISCUSSION

Title VIII of the Civil Rights Act of 1968 ("Fair Housing Act" or "the Act"), 42 U.S.C. §§ 3601-3631 (1982), was enacted pursuant to Congress' thirteenth amendment powers, *see Williams v. Matthews Co.*, 499 F.2d 819, 825

(8th Cir.), *cert. denied*, 419 U.S. 1021 & 1027 (1974); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120-21 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Section 3604 of the statute prohibits discrimination because of race, color or national origin in the sale or rental of housing by, *inter alia*: (1) refusing to rent or make available any dwelling, *id.* § 3604(a); (2) offering discriminatory "terms, conditions or privileges" of rental, *id.* § 3604(b); (3) making, printing or publishing "any notice, statement, or advertisement . . . that indicates any preference, limitation, or discrimination based on race, color . . . or national origin," *id.* § 3604(c): and (4) representing to any person "that any dwelling is not available for . . . rental when such dwelling is in fact so available," *id.* § 3604(d).

Housing practices unlawful under Title VIII include not only those motivated by a racially discriminatory purpose, but also those that disproportionately affect minorities. *See, e.g., Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-37 (2d Cir. 1979). Section 3604 "is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons." *See Southend Neighborhood Improv. Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984). Although "not every denial, especially a temporary denial, of low-income public housing has a discriminatory impact on racial minorities" in violation of Title VIII, *see Arthur v. City of Toledo*, 782 F.2d 565, 577 (6th Cir. 1986), an action leading to discriminatory effects on the availability of housing violates the

Act, *see Southend Neighborhood Improv. Ass'n*, 743 F.2d at 1209-10.

Starrett's allocation of public housing facilities on the basis of racial quotas, by denying an applicant access to a unit otherwise available solely because of race, produces a "discriminatory effect . . . [that] could hardly be clearer." *Burney v. Housing Auth.*, 551 F. Supp. 746, 770 (W.D. Pa. 1982). Appellants do not contend that the plain language of section 3604 does not proscribe their practices. Rather, they claim to be "clothed with governmental authority" and thus obligated, under *Otero v. New York City Housing Auth.*, 484 F.2d 1122 (2d Cir. 1973), to effectuate the purpose of the Fair Housing Act by affirmatively promoting integration and preventing "the reghettoization of a model integrated community." We need not decide whether Starrett is a state actor, however. Even if Starrett were a state actor with such a duty, the racial quotas and related practices employed at Starrett City to maintain integration violate the antidiscrimination provisions of the Act.

Both Starrett and the government cite to the legislative history of the Fair Housing Act in support of their positions. This history consists solely of statements from the floor of Congress. *See Hunter*, 459 F.2d at 210 n.4. These statements reveal "that at the time that Title VIII was enacted, Congress believed that strict adherence to the antidiscrimination provisions of the [A]ct" would eliminate "racially discriminatory housing practices [and] ultimately would result in residential integration." *Burney*, 551 F. Supp. at 769; *see* Rubinowitz & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*,

74 Nw. U.L. Rev. 491, 538 n.178 (1979). Thus, Congress saw the antidiscrimination policy as the means to effect the antisegregation-integration policy. *See* 551 F. Supp. at 769. While quotas promote Title VIII's integration policy, they contravene its antidiscrimination policy, bringing the dual goals of the Act into conflict. The legislative history provides no further guidance for resolving this conflict.

We therefore look to analogous provisions of federal law enacted to prohibit segregation and discrimination as guides in determining to what extent racial criteria may be used to maintain integration. Both the thirteenth amendment, pursuant to which Title VIII was enacted, and the fourteenth amendment empower Congress to act in eradicating racial discrimination. *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 816 n.12 (3d Cir. 1978), and both the fourteenth amendment and Title VIII are informed by the congressional goal of eradicating racial discrimination through the principle of antidiscrimination, *see Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669, 694 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (stating that each of these provisions "proscribes discriminatory conduct because of race or color"). Further, the parallel between the antidiscrimination objectives of Title VIII and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982), has been recognized. *See, e.g., Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). Thus, the Supreme Court's analysis of what constitutes permissible race-conscious affirmative action under provisions of federal law with goals similar to those of Title VIII provides a framework for examining the affirmative use of racial quotas under the Fair Housing Act.

Although any racial classification is presumptively discriminatory, *see Personnel Admin. v. Feeney*, 442 U.S. 256, 272 (1979), a race-conscious affirmative action plan does not necessarily violate federal constitutional or statutory provisions, *see, e.g., United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987) (plurality opinion) (fourteenth amendment); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (Title VII). However, a race-conscious plan cannot be "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1848 (1986) (plurality opinion). A plan employing racial distinctions must be temporary in nature with a defined goal as its termination point. *See, e.g., Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1456 (1987); *Paradise*, 107 S. Ct. at 1070; *Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3053 (1986) (fifth amendment equal protection); *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980); *Weber*, 443 U.S. at 208-09; *see also Jaimes v. Lucas Metropolitan Housing Auth.*, 833 F.2d 1203, 1208 (6th Cir. 1987) (stating that affirmative integration plan for public housing authority "should end upon the [district] court's finding that its goal has been accomplished"). Moreover, we observe that societal discrimination alone seems "insufficient and over expansive" as the basis for adopting so-called "benign" practices with discriminatory effects "that work against innocent people," *Wygant*, 106 S. Ct. at 1848, in the drastic and burdensome way that rigid racial quotas do. Furthermore, the use of quotas generally should be based on some history of racial discrimination, *see id.* at 1847, or imbalance, *see Johnson*, 107 S. Ct. at 1452-53, within the entity seeking to employ them. Finally, measures designed to increase or ensure minority participation, such as "ac-

cess'' quotas, *see Burney*, 551 F. Supp. at 763, have generally been upheld, *see, e.g.*, *Johnson*, 107 S. Ct. at 1456-57; *Paradise*, 107 S. Ct. at 1070-71; *Weber*, 443 U.S. at 208. However, programs designed to maintain integration by limiting minority participation, such as ceiling quotas, *see Burney*, 551 F. Supp. at 763, are of doubtful validity, *see Jaimes*, 833 F.2d at 1207 (invalidating public housing authority integration plan to the extent it acts as strict racial quota), because they " 'single[ ] out those least well represented in the political process to bear the brunt of a benign program,' " *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring) (quoting *Regents v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part)).

Starrett's use of ceiling quotas to maintain integration at Starrett City lacks each of these characteristics. First, Starrett City's practices have only the goal of integration maintenance. The quotas already have been in effect for ten years. Appellants predict that their race-conscious tenanting practices must continue for at least fifteen more years, but fail to explain adequately how that approximation was reached. In any event, these practices are far from temporary. Since the goal of integration maintenance is purportedly threatened by the potential for "white flight" on a continuing basis, no definite termination date for Starrett's quotas is perceivable. Second, appellants do not assert, and there is no evidence to show; the existence of prior racial discrimination or discriminatory imbalance adversely affecting whites within Starrett City or appellants' other complexes. On the contrary, Starrett City was initiated as an integrated complex, and Starrett's avowed purpose for employing race-based tenanting practices is to maintain that initial integration. Fi-

nally, Starrett's quotas do not provide minorities with access to Starrett City, but rather act as a ceiling to their access. Thus, the impact of appellants' practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities. Starrett claims that its use of quotas serves to keep the numbers of minorities entering Starrett City low enough to avoid setting off a wave of "white flight." Although the "white flight" phenomenon may be a factor "take[n] into account in the integration equation," *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1979), it cannot serve to justify attempts to maintain integration at Starrett City through inflexible racial quotas that are neither temporary in nature nor used to remedy past racial discrimination or imbalance within the complex.

Appellants' reliance on *Otero* is misplaced. In *Otero* the New York City Housing Authority ("NYCHA") relocated over 1800 families in the Lower East Side of Manhattan to make way for the construction of new apartment buildings. 484 F.2d at 1125. Pursuant to its regulations, NYCHA offered the former site occupants first priority of returning to any housing built within the urban renewal area. *Id.* 1125-26. However, because the response by the largely minority former site residents seeking to return was nearly seven times greater than expected, NYCHA declined to follow its regulation in order to avoid creating a "pocket ghetto" that would "tip" an integrated community towards a predominantly minority community. *Id.* at 1124, 1126. It instead rented up half of these apartments to non-former site occupants, 88% of whom were white. *Id.* at 1128.

In a suit brought by former site occupants who were denied the promised priority, the district court held as a matter of law that "affirmative action to achieve racially balanced communities was not permitted where it would result in depriving minority groups" of public housing, and thus granted summary judgment in favor of plaintiffs. *Id.* at 1130. This court reversed the grant of summary judgment, stating that public housing authorities had a federal constitutional and statutory duty "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos," but we recognized that "the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location." *Id.* at 1133-34.

Otero does not, however, control in this case. The challenge in *Otero* did not involve procedures for the long-term maintenance of specified levels of integration, but rather, the rental of 171 of 360 new apartments to non-former site occupants, predominantly white, although former site residents, largely minority, sought those apartments and were entitled to priority under NYCHA's own regulation. The *Otero* court did not delineate the statutory or constitutional limits on permissible means of integration, but held only that NYCHA's rent-up practice could not be declared invalid as a matter of law under those limits. In fact, the court in *Otero* observed that the use of race-conscious tenanting practices might allow landlords "to engage in social engineering, subject only to general undefined control through judicial supervision" and could "constitute a form of unlawful racial discrimination." *Id.* at 1136.

It is particularly important to note that the NYCHA action challenged in *Otero* only applied to a single event—the initial rent up of the new complexes—and determined tenancy in the first instance alone. NYCHA sought only to prevent the immediate creation of a "pocket ghetto" in the Lower East Side, which had experienced a steady loss of white population, that would tip the precarious racial balance there, resulting in increased white flight and inevitable "non-white ghettoization of the community." *Id.* at 1124. Further, the suspension of NYCHA's regulation did not operate as a strict racial quota, because the former site residents entitled to a rental priority were approximately 40% white, *id.* at 1128. As a one-time measure in response to the special circumstances of the Lower East Side in the early 1970's, the action challenged in *Otero* had an impact on non-whites as a group far less burdensome or discriminatory than Starrett City's continuing practices.

CONCLUSION

We do not intend to imply that race is always an inappropriate consideration under Title VIII in efforts to promote integrated housing. We hold only that Title VIII does not allow appellants to use rigid racial quotas of indefinite duration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them. We therefore affirm the judgment of the district court.

JON O. NEWMAN, *Circuit Judge*, dissenting:

Congress enacted the Fair Housing Act to prohibit racial segregation in housing. Starrett City is one of the most successful examples in the Nation of racial integration in housing. I respectfully dissent because I do not believe that Congress intended the Fair Housing Act to prohibit the maintenance of racial integration in private housing.

I.

Starrett City is a privately owned apartment complex in Brooklyn. It consists of 46 high-rise buildings containing 5,881 rental units. Nearly 17,000 people live there. From its inception Starrett City has been planned and operated to achieve and maintain racial integration.

The complex was originally to have been built as a cooperatively owned housing development by the sponsor of Co-Op City in the Bronx. When financing was not obtained, the project was taken over by the current owner, whose business was rental housing. Because New York City had given the previous developer substantial tax abatements, the City's approval was necessary if Starrett City was to have the benefit of these tax abatements. The prospect of a large, low-income rental housing complex generated considerable political opposition within the City from those who feared that the project would attract only minority tenants. The new owner and the New York State Division of Housing and Community Renewal (DHCR) gave assurances that affirmative steps would be taken to maintain Starrett City as an integrated community. On these assurances, the New York City Board of Estimate

approved the construction of Starrett City as a rental development.

At that time, DHCR policy called for an integration goal of 70% majority and 30% minority tenants in state-sponsored projects. The defendants adopted this goal for Starrett City. Since the size of tenants' families varied, the target percentages reflected the anticipated racial distribution of rental units, rather than of persons living in the complex. To reach its target of racial balance, Starrett City explicitly declined to rent on a first-come, first-served basis. Instead, reacting to the fact that Blacks and other minorities applied for apartments at Starrett City in far greater numbers than Whites, the management imposed ceilings on the number of apartments of various sizes that would be rented to Blacks and other minorities. As the number of tenants of each minority reached the ceiling for a particular size of apartment, subsequent applicants from that minority were placed on a waiting list until sufficient vacancies occurred to permit a rental to a member of that minority without exceeding the established ceiling.

As experience with this rental policy developed, Starrett City decided that it would permit the percentage of apartments rented to minorities to move above 30% and to reach approximately 35%. The components of this aggregate figure are 21% Black, 8% Hispanic, 4.5% Oriental, and 2% other or mixed. These figures have been fairly constant since 1976. During that period the minority percentage of the Starrett City *population* has been approximately 45%. In 1984, Starrett City agreed, as part of a settlement of a lawsuit brought by a class of Black applicants, to raise the minority rental unit percentage to 38% over five years.

The consequence of Starrett's policy of maintaining racial balance has been that Black applicants constitute a disproportionately larger share of the waiting list for apartments than do Whites, and remain on the list for considerably longer periods of time than do Whites. As of November 1985, Blacks made up approximately 54% of the waiting list while Whites filled approximately 22% of the places on the list. For a two-bedroom apartment, the average waiting time on the list for qualified applicants was twenty months for Blacks and two months for Whites; for a one-bedroom apartment, the comparable figures were eleven months and four months.[1]

The development of Starrett City as an apartment complex committed to a deliberate policy of maintained racial integration has at all times occurred with the knowledge, encouragement, and financial support of the agency of the United States directly concerned with housing, the Department of Housing and Urban Development (HUD). Under a contract between HUD and Starrett City, the federal government pays all but one percent of the debt service of the mortgage loan extended to Starrett City by the New York State Housing Finance Agency (HFA). By March 1986 HUD had paid HFA more than $211 million on Starrett City's behalf. In exchange for this interest subsidy, Starrett City agreed to limit the rent for eligible tenants to a monthly figure specified by HUD or to a stated percentage of the tenant's monthly income (initially 25%, now 30%), whichever is greater. In addition, HUD has pro-

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1 Occasionally, the burden of Starrett City's rental policy falls on Whites. The complex designates certain buildings for senior citizens and, during periods when White seniors have applied for these units in greater numbers than Black seniors, White seniors have waited for apartments longer than Black seniors.

vided rental subsidies for tenants with low incomes. Since 1981 these rental subsidies have been nearly $22 million a year.

Despite its close cooperation in the development of Starrett City as an integrated housing complex, the United States now sues Starrett City to force it to abandon the rental policies that have enabled it to maintain racial integration. The bringing of the suit raises a substantial question as to the Government's commitment to integrated housing. The timing of the suit puts that commitment further in doubt. In 1979 a class of Black applicants for housing at Starrett City brought suit to challenge on federal statutory and constitutional grounds the same tenant selection policies at issue in this case. *Arthur v. Starrett City Associates*, 79 Civ. 3096 (ERN) (E.D.N.Y. 1979). With the federal government observing from the sidelines, the parties to the *Arthur* litigation engaged in protracted settlement negotiations. More than four years later, a mutually advantageous settlement was reached. Starrett City was permitted to continue its policy of maintaining integration through its tenant selection policies. In return, Starrett City agreed to increase by three percent over five years the proportion of rental units occupied by minority tenants. At the same time, DHCR, the state housing agency, which was also a defendant in the *Arthur* litigation, agreed to take affirmative steps to promote housing opportunities for minorities in DHCR-supervised housing projects in New York City. Specifically, the State agency agreed to give a priority in other projects to minority applicants on the Starrett City waiting list. No member of the class of minority applicants for housing at Starrett City objected to the settlement. Thus, the needs of the minority class for whose benefit the suit had been brought were met

to their satisfaction by providing for more rental opportunities both at Starrett City and elsewhere. Just one month after that settlement was reached, the United States filed this suit, ostensibly concerned with vindication of the rights of the same minority applicants for housing who had just settled their dispute on favorable terms.

II.

The only issue in this case is whether Starrett City's rental policies violate Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985), generally known as the "Fair Housing Act." The United States has explicitly declined to assert any claim of a constitutional violation. *See* Brief for Appellee at 27 n.9.

The defendants do not dispute that their rental policies fall within the literal language of Title VIII's prohibition on discriminatory housing practices.[2] *See* 42 U.S.C. § 3604. Instead they contend that they are state actors for purposes of the Fourteenth Amendment, that their policies are to be tested under both the Fourteenth Amendment and the Fair Housing Act by the strict scrutiny standard of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and that they meet this test because their race-conscious policies further the compelling state interest of promoting integrated housing and are narrowly tailored to achieve that interest. At a minimum, they contend, they are entitled to a trial on the merits to prove their claim.

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2 Though no applicants have been barred from housing because of their race, it is admitted that minority applicants, because of their race, remain on the Starrett City waiting list longer than White applicants.

In my view, the defendants are entitled to prevail simply on the statutory issue to which the Government has limited its lawsuit. Though the terms of the statute literally encompass the defendants' actions, the statute was never intended to apply to such actions. This statute was intended to bar perpetuation of segregation. To apply it to bar maintenance of integration is precisely contrary to the congressional policy "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.

We have been wisely cautioned by Learned Hand that "[t]here is no surer way to misread a document than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (concurring opinion), *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). That aphorism is not always true with respect to statutes, whose text is always the starting point for analysis and sometimes the ending point. But literalism is not always the appropriate approach even with statutes, as the Supreme Court long ago recognized: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intent of its makers." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

Title VIII bars discriminatory housing practices in order to end segregated housing. Starrett City is not promoting segregated housing. On the contrary, it is maintaining integrated housing. It is surely not within the spirit of the Fair Housing Act to enlist the Act to bar integrated housing. Nor is there any indication that application of the statute toward such a perverse end was within the intent of those who enacted the statute. It is true that there are some

statements in the legislative history that broadly condemn discrimination for "any" reason. Senator Mondale, the principal sponsor of Title VIII, said that "we do not see any good reason or justification, in the first place, for permitting discrimination in the sale or rental of housing." 114 Cong. Rec. 5642 (1968). But his context, like that in which the entire debate occurred,[3] concerned maintenance of segregation, not integration. His point was that there was no reason for discriminating against a Black who wished to live in a previously all-White housing project. He explicitly decried the prospect that "we are going to live separately in white ghettos and Negro ghettos." *Id.* at 2276. The purpose of Title VIII, he said, was to replace the ghettos "by truly integrated and balanced living patterns." *Id.* at 3422. As he pointed out, "[O]ne of the biggest problems we face is the lack of experience in actually living next to Negroes." *Id.* at 2275. Starrett City is committed to the proposition that Blacks and Whites shall live next to each other. A law enacted to enhance the opportunity for people of all races to live next to each other should not be interpreted to prevent a landlord from maintaining one of the most successful integrated housing projects in America.

None of the legislators who enacted Title VIII ever expressed a view on whether they wished to prevent the maintenance of racially balanced housing. Most of those who passed this statute in 1968 probably could not even contemplate a private real estate owner who would deliberately set out to achieve a racially balanced tenant population. Had they thought of such an eventuality, there is

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3 Because Title VIII was offered as a floor amendment in the Senate, there are no committee reports.

not the slightest reason to believe that they would have raised their legislative hands against it.

This Circuit has previously ruled that Title VIII does not apply literally to prohibit racially based rental policies adopted to promote integration. *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). In that case a public housing authority had committed itself by regulation to give first priority for rental housing to applicants who had been displaced by construction of the project. The housing authority then disregarded its own regulation, based on its apprehension that giving first priority to the class of those displaced from the site, most of whom were non-White, would cause the project to pass the so-called "tipping point" and become predominantly non-White. The first question in *Otero* was whether the authority's deliberate decision not to honor its priority policy because the benefitted class was predominantly non-White violated Title VIII. The Court held that the Act was not violated simply because a race-conscious decision had been made in connection with rental policy:

> Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location.

Id. at 1134.

Once the Court decided that a race-conscious rental policy did not necessarily violate the Act, it then faced the difficult issue in the case—whether the Act imposed an affirmative duty to promote integration of sufficient force

to permit the authority to violate its own regulation. On that issue, the Court also ruled in favor of the authority, remanding for a trial at which the defendant could establish that its apprehension concerning a "tipping point" was well founded and that abandonment of its priority policy was necessary to promote integration.

Our case is much easier than *Otero*. Starrett City is not seeking to be released from a commitment it has previously made to any of the applicants for housing. To prevail it need not find in Title VIII some affirmative obligation compelling it to promote integration. It has freely chosen to promote integration and is entitled to prevail unless something in Title VIII forbids its voluntary policy. If anything in Title VIII prohibited race-conscious rental policies adopted to promote integration, *Otero* would have been summarily decided against the defendant.

Acknowledging the significance of the ruling in *Otero*, the Court distinguishes it essentially on the ground that *Otero* involved a policy of limited duration, applicable only to the period in which those displaced from the site were applying for housing in the new project, whereas Starrett City seeks to pursue a long-term policy of maintaining integration. I see nothing in the text or legislative history of Title VIII that supports such a distinction. If, as the Court holds, Title VIII bars Starrett City's race-conscious rental policy, even though adopted to promote and maintain integration, then it would bar such policies whether adopted on a short-term or a long-term basis. Since the Act makes no distinction among the durations of rental policies alleged to violate its terms, *Otero*'s upholding of a race-conscious rental policy adopted to promote

integration cannot be ignored simply because the policy was of limited duration.[4]

But even if Title VIII can somehow be construed to make the lawfulness of a race-conscious rental policy that promotes integration turn on the duration of the policy, Starrett City is entitled to a trial so that it can prove its contention that its policy is still needed to maintain integration. In the District Court the Government, though seeking summary judgment, contested Starrett City's factual contention that a race-conscious rental policy was currently needed to prevent the complex from passing the "tipping point" and becoming segregated. The Government relied on a brief affidavit of a HUD employee, who made primarily the unremarkable observation that it is difficult to predict with any certainty the precise "tipping point" in a particular neighborhood. In opposing summary judgment, Starrett City presented detailed affidavits

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4 The Court, drawing a parallel between Title VIII and Title VII, which bars discrimination in employment, 42 U.S.C. § 2000e (1982), supports its view of Title VIII with Supreme Court decisions approving only limited use of race-conscious remedies under statutory and constitutional standards in the employment context. Though Titles VIII and VII share a common objective of combatting discrimination, their differing contexts preclude the assumption that the law of affirmative action developed for employment is readily applicable to housing. The Title VII cases have not been concerned with a "tipping point" beyond which a work force might become segregated. Yet that is a demonstrated fact of life in the context of housing. *Cf. Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 718-20 (2d Cir. 1979) (recognizing validity of a "tipping point" concern in the public school context in the course of framing a remedial desegregation decree). The statutory issue arising under Title VIII should be decided on the basis of what practices Congress was proscribing when it enacted this provision. Whether the constitutional standards for affirmative action differ between the employment and housing contexts need not be considered since the Government has explicitly declined in this litigation to advance any claim of unconstitutional action.

providing abundant evidence to show that abandonment of its rental policies would cause the complex to pass the "tipping point" and soon become a segregated development. This evidence was solidly based on relevant experience. Several housing developments near Starrett City, operating without a policy of integration maintenance, have become racially segregated, including one across the street from Starrett City.

Otero established for this Circuit that a race-conscious rental policy adopted to promote integration does not violate Title VIII and that a defendant must be afforded an opportunity to demonstrate at a trial that its rental policy is needed to prevent a housing complex from becoming segregated. Starrett City's affidavit evidence may well be sufficient to entitle it to summary judgment on this issue of continued need for a race-conscious rental policy to maintain integration. At a minimum it is entitled to a trial to present its evidence to a trier of fact.[5]

Whether integration of private housing complexes should be maintained through the use of race-conscious rental policies that deny minorities an equal opportunity to rent is a highly controversial issue of social policy. There is a substantial argument against imposing any artificial burdens on minorities in their quest for housing. On the other hand, there is a substantial argument against forcing an integrated housing complex to become

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5 The Court faults Starrett City for not adequately explaining the basis for its estimate of the time during which its rental policies would have to be retained in the future in order to avoid segregation. If such an explanation is needed, the Court should remand for a trial so that witnesses can be called to provide it. In any event, the issue is whether Title VIII prohibits what Starrett City is doing today, not whether Starrett City has made an incorrect estimate of what it will have to do sometime in the future to maintain integration.

segregated, even if current conditions make integration feasible only by means of imposing some extra delay on minority applicants for housing. Officials of the Department of Justice are entitled to urge the former policy. Respected civil rights advocates like the noted psychologist, Dr. Kenneth Clark, are entitled to urge the latter policy, as he has done in an affidavit filed in this suit. That policy choice should be left to the individual decisions of private property owners unless and until Congress or the New York legislature decides for the Nation or for New York that it prefers to outlaw maintenance of integration. I do not believe Congress made that decision in 1968, and it is a substantial question whether it would make such a decision today. Until Congress acts, we should not lend our authority to the result this lawsuit will surely bring about. In the words of Dr. Clark:

> [I]t would be a tragedy of the highest magnitude if this litigation were to lead to the destruction of one of the model integrated communities in the United States.

Because the Fair Housing Act does not require this tragedy to occur, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 87-6132

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July one thousand nine hundred and eighty-seven.

Present:

Hon. JON O. NEWMAN, Hon. ROGER J. MINER,
Hon. FRANK X. ALTIMARI,
Circuit Judges,

USA

—v.—

STARRETT CITY ASSOC

The judgment of the district court, which has previously been stayed pending the hearing of oral argument in the Second Circuit is further stayed pending disposition of this appeal.

For the Court,

/s/ ARTHUR HELLER
Arthur Heller,
Deputy Clerk

FILED: July 18, 1987
Elaine B. Goldsmith, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 87-6132

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 7th day of April one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., AND DELMAR MANAGEMENT COMPANY,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

FILED: April 7, 1988
Elaine B. Goldsmith, Clerk

APPENDIX D

D-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87-6132

UNITED STATES,

Plaintiff-Appellee.

—vs.—

STARRETT CITY ASSOCIATES, et al.

Defendants-Appellants.

Before:

HON. ROGER J. MINER, HON. FRANK X. ALTIMARI,
Circuit Judges.

MOTION FOR STAY OF MANDATE PENDING
PETITION FOR WRIT OF CERTIORARI

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

April 15, 1988

ELAINE B. GOLDSMITH, CLERK
/s/ ART HELLER, DEPUTY CLERK

APPENDIX E

E-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87-6132

UNITED STATES,

Plaintiff-Appellee.

—vs.—

STARRETT CITY ASSOCIATES, et al.

Defendants-Appellants.

Before:

HON. JON. O. NEWMAN, HON. ROGER J. MINER,
HON. FRANK X. ALTIMARI,

Circuit Judges.

MOTION FOR EXTENSION OF STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

May 5, 1988

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith, Clerk

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

84 CV 2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Defendants.

APPEARANCES:

U.S. DEPT. OF JUSTICE
CIVIL RIGHTS DIVISION
HOUSING AND CIVIL ENFORCEMENT SECTION
Washington, D.C.
Attorneys for Plaintiff

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PETER BUSCEMI, ESQ.
MICHAEL G. CAREY, ESQ.
DANIEL L. SOSLAND, ESQ.

OPINION AND ORDER

NEAHER, *Senior District Judge.*

The Attorney General, on behalf of the United States (hereinafter "the government"), commenced this action pursuant to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631, hereinafter referred to as the "Fair Housing Act".[1] In brief, the government contends that the defendants, who constructed, own and operate the extensive apartment housing complex in the Borough of Brooklyn, known as "Starrett City", have continuously violated § 3604 of the Fair Housing Act. That section makes it unlawful

> "(a) To refuse to . . . rent. . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, . . .or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling . . . because of race, color . . . or national origin.
>
> (c) To make, . . . or cause to be made, printed or published any notice, statement or advertisement, with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, . . . or national origin, or an intention to make any such preference, limitation or discrimination.

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1 Pursuant to § 813 of the Civil Rights Act of 1968, the Attorney General may bring a civil action in any appropriate United States district court when he has reasonable cause to believe "that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted" by the Act. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

> (d) To represent to any person because of race, color, . . . or national origin that any dwelling is not available for . . . rental when such dwelling is in fact so available.

The parties have joined issue by way of cross-motions for summary judgment accompanied by voluminous documentation. The issue to be decided is whether Starrett City's long-standing policy of limiting the percentage of black and hispanic applicants, who will be accepted as tenants, violates § 3604.

Background Facts

Starrett City was privately constructed in Brooklyn on a site originally planned for a 6,000 unit development of cooperative apartments to be named Twin Pines Village. That project, undertaken by the United Housing Foundation (UHF), was abandoned in 1971 despite a $124,000,000 loan extended by the New York State Housing Finance Agency (HFA). Subsequently, Starrett Housing Corporation agreed to take over the development, the State agreeing that it would be operated as rental housing rather than cooperative apartments.

The change from cooperative to rental status required approval by the New York City Board of Estimate because the city real estate tax abatement granted to Twin Pines village under the Mitchell-Lama program had to be transferred to Starrett City. According to Robert C. Rosenberg, Senior Vice President of Starrett City, Inc. and General Manager of co-defendant Delmar Management Co., who has managed Starrett City since July 1973, there was substantial community opposition to the transfer, including that of the Brooklyn Borough President and a member of Congress from Brooklyn, who threatened to oppose transfer of the federal contract for the payment of interest subsidies. Opposition centered on the fear that, in light of the neighborhood surrounding the project and past experience with subsidized housing, the conversion to rental apartments would result in Starrett City's becoming an overwhelmingly minority development. Nonetheless, the resolution was adopted by vote of 20 to 2, only the Brooklyn Borough President dissenting,

upon the assurance of Starrett City's developer that it was intended to create a racially integrated community.

Privately owned and managed, Starrett City is the largest housing development in the United States assisted by both the federal government, through its Department of Housing and Urban Development (HUD), and the State of New York through its Housing Finance Agency (HFA). In contrast to Starrett City's owners, whose capital contribution totals $19,091,000, HFA has increased its mortgage loan to Starrett to $362,720,000, funds which, of course, are derived ultimately from the taxpayers of the State and the United States. In addition, under Section 236 of the National Housing Act of 1934, as amended, 12 U.S.C. § 1715z-1, HUD makes monthly payments to HFA which reduce from 8-1/2% to 1% the interest rate that Starrett City would otherwise have to pay on its mortgage loan. From April 1975 through March 1986, HUD has paid HFA $211,275,605 in reduction of Starrett City's debt service obligation.

Eligible tenants at Starrett City are also the beneficiaries of a HUD Rental Assistance Program ("RAP") and Section 8 subsidies. Originally limited to one-bedroom apartments housing senior citizens, the program of rent subsidies has since January 1981 been expanded to apply to all of the 5,881 apartments. The maximum income limits for families applying for such benefits are as follows:

Number of Persons	*Low Income*	*Very Low Income*
1	$15,250	$10,000
2	17,400	11,000
3	19,550	12,800
4	21,750	14,250
5	23,100	15,400
6	24,450	16,550

Under the Section 8 agreements, which run for 15 years, Starrett City must rent at least 30% of the Section 8 units (*i.e.*, at least 1000 units) to Very Low Income Families; viz., those whose income does not exceed 80% of the median income for

the area. That contractual obligation is required by the governing statute and regulations. 42 U.S.C. § 1437f(c)(7) (1976) (stricken by Pub.L. 97-35 § 322e(2), 95 Stat. 357, 402); 24 C.F.R. § 882.113 (1980). The 1981 amendments eliminated the difference between RAP and Section 8 tenants by providing that rents for new RAP and Section 8 tenants would thereafter be set at 30% of adjusted monthly income, and rents for existing RAP and Section 8 tenants would gradually increase, over a five year period, to 30% of adjusted monthly income. 12 U.S.C. § 1715z-1(f) (1982); 42 U.S.C. § 1437a(a). The current funding limit for Section 8 subsidies at Starrett City is $12.5 million.

Starrett City Tenanting Procedure

The first step in the application process for an apartment at Starrett City is the completion of a Preliminary Information Card (P.I. Card), containing the applicant's name, address, race or national origin, family composition, type of apartment sought, and information about the applicant's employment and income. The applicant mails the P.I. card to Starrett City, where rental office personnel determine whether an applicant is preliminarily eligible, based upon income, family composition and size of apartment requested. When an applicant is determined to be preliminarily eligible, a letter is sent advising him or her of apparent eligibility, and indicating that no apartments are available but that the applicant's name has been placed in the active file, and that he or she will be contacted as soon as Starrett can offer an apartment.

The active file is used as a waiting list and is cross-filed in chronological order by apartment size, income and race or national origin. For example, for one-bedroom apartments and applicants with incomes between $15,000 and $20,000, separate files are maintained for white applicants, black applicants, hispanic applicants, mixed-race applicants and others. Similar files are maintained by racial or national origin groupings for persons having income levels for two and three bedroom apartments.

Applicants are selected from the active files for final processing, which consists of final eligibility determination, credit and income checks and a home visit. A pool of fully processed applicants is maintained, from which applicants are offered apartments as vacancies occur. As the pool of processed applicants shrinks, applicants from the active files are added to the pool. To maintain by apartment a racial balance of approximately 64% white, 22% black, and 8% hispanic, the race or national origin of vacating tenants is noted and applicants of similar race or national origin are selected for the pool.

The consistency of Starrett City's tenant selection process over the years is reflected in the following table, which sets forth the number and percentage of units at Starrett City occupied by each racial and ethnic group for the dates indicated:

Date	Total	White	(%)	Black	(%)	Hispanic	(%)	Oriental	(%)	Other	(%)
12/75	1578	909	(57.6)	369	(23.4)	265	(16.8)	32	(2.0)	3	(0.2)
1/76	1660	953	(57.4)	393	(23.7)	276	(16.6)	35	(2.1)	3	(0.2)
2/76	1912	1147	(60.0)	428	(22.4)	289	(15.1)	45	(2.4)	3	(0.2)
4/76	2309	1428	(61.8)	511	(22.1)	310	(13.4)	56	(2.4)	4	(0.2)
5/76	2651	1692	(63.8)	557	(21.0)	334	(12.6)	64	(2.4)	4	(0.2)
3/77	3798	2532	(66.7)	803	(21.1)	382	(10.1)	42	(1.1)	39	(1.0)
4/77	3898	2602	(66.8)	822	(21.1)	382	(9.8)	48	(1.2)	44	(1.1)
6/77	4098	2717	(66.3)	856	(20.9)	391	(9.5)	73	(1.8)	61	(1.5)
8/77	4364	2867	(65.7)	895	(20.5)	403	(9.2)	107	(2.5)	92	(2.1)
7/78	4744	3004	(63.3)	1013	(21.4)	389	(8.2)	181	(3.8)	157	(3.3)
8/78	4821	3033	(62.9)	1025	(21.3)	406	(8.4)	186	(3.9)	171	(3.5)
9/78	4895	3069	(62.7)	1030	(21.0)	425	(8.7)	195	(4.0)	176	(3.6)
10/78	4969	3103	(62.4)	1050	(21.1)	438	(8.8)	203	(4.1)	175	(3.5)
11/78	5015	3118	(62.2)	1069	(21.3)	449	(9.0)	203	(4.0)	176	(3.5)
12/78	5061	3159	(62.4)	1065	(21.0)	458	(9.0)	202	(4.0)	177	(3.5)
6/79	5340	3395	(63.6)	1109	(20.8)	457	(8.6)	201	(3.8)	178	(3.3)
8/79	5456	3502	(64.2)	1144	(21.0)	460	(8.4)	196	(3.6)	154	(2.8)
1/80	5518	3521	(63.8)	1154	(20.9)	421	(7.6)	228	(4.1)	194	(3.5)
10/81	5773	3693	(64.0)	1174	(20.3)	453	(7.8)	281	(4.9)	172	(3.0)
2/82	5789	3721	(64.3)	1177	(20.3)	447	(7.7)	279	(4.8)	165	(2.9)
1/84	5785	3743	(64.7)	1206	(20.8)	459	(7.9)	259	(4.5)	118	(2.0)

Starrett City's tenant selection practices have always limited blacks and hispanics to far fewer apartments than would be expected if race and national origin were not taken into account in the tenant selection process. Conversely, whites have received substantially more apartments than their application rates project. In the rent-up period, fully completed apartments were kept off the market even though eligible blacks and other minorities were available on the waiting list. Thus, in February 1979, blacks constituted over 47% of the waiting list but occupied fewer than 21% of Starrett City apartments in June 1979, whereas whites constituting less than 24% of those on the waiting list occupied more than 63% of the apartments. As of October 1985, blacks made up 53.7% of the waiting list but, as of January 1984, occupied only 20.8% of Starrett City apartments. Similarly, hispanics, who made up 18% of the waiting list, occupied only 7.9% of the apartments. In contrast, whites, who made up only 21.9% of the waiting list, occupied 64.7% of the apartments.

As a result of defendants' racially controlled tenant selection program, the average waiting time for black or hispanic applicants is significantly longer than the average waiting time of white applicants. Defendants do not deny this; in fact, they admit that minorities continue to wait longer for apartments than do whites as a result of their practice of managed waiting lists. This is illustrated by the following table:

	1 Bedroom	*2 Bedroom*	*3 Bedroom*
White	4 mos.	2 mos	2 mos.
Black	11 mos.	20 mos.	18 mos.
Hispanic	5 mos.	4 mos.	9-1/2 mos.

Defendants' Position

Defendants assert that it is necessary to take race and national origin into account in selecting tenants in order to preserve stable integration at Starrett City. They contend that the discontinuance of their current rental practices, in view of the large number of minority applicants on the waiting list and the proportionately higher moveout rate of whites, would result in a predominantly minority tenant population at Starrett City. In

fact, they hope to achieve a substantially larger proportion of white applicants as the result of a newly adopted advertising campaign for Starrett City and additional residential developments in the area. Defendants predict that it will be at least fifteen years before they will stop selecting tenants on the basis of race and national origin.[2]

In contrast to their current position is a document defendants signed December 11, 1973, which was approved by the State Commissioner of Housing and Community Renewal, and which specifically provided:

> "The Owner and the Agent [Starrett City, Inc. and Delmar Management Co.] *will not discriminate against any applicant for an apartment* or any tenants already in occupancy because of sex, *race*, creed, *color or national origin*. The Owner and the Agent will take affirmative action to insure open occupancy and racial integration in the operation of the project. Such action shall be taken with reference, but not to be limited to: advertising, use of available subsidies such as capital grant funds, H.O.P.E. loans, interest payment subsidies and other aids which may be used to encourage integrated occupancy of the project." (Emphasis supplied).

Defts. Exh. G, Notice of Cross-Motion for Summary Judgment. That agreement was reapproved when the Starrett parties later amended it. Moreover, when defendants' Affirmative Marketing Plan was approved in June 1975, they were made aware that "different processing procedures" could not "be utilized on the basis of race," in dealing with minority or majority persons in furthering their marketing plan. Defts. Exh. D.

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2 However, in March 1985, in order to terminate an earlier action brought by black citizens complaining of defendants rental practices, defendants agreed to increase the apartments available to black and hispanic applicants by 175 units at the rate of 35 units per year over a five-year period, subject to the availability of vacancies. *Arthur v. Starrett City Associates*, 79 CV 3096 (E.D.N.Y. 1984) (settlement decree).

And again on January 19, 1981, when Starrett City, Inc. entered into an Amendatory Rental Assistance Contract with HUD, which increased the amount of payments to $9,389,543 for 2,538 rental assistance units, it was reminded of the following "NONDISCRIMINATION" clause:

> "(a) *General.* The Owner shall not in the selection of Families, in the provisions of services, or in any manner, discriminate against any person on the grounds of race, color, creed, religion, sex, national origin, or handicap.
>
> (c) * * * The owner shall comply with all requirements imposed by Title VIII of the Civil Rights Act of 1968, which prohibits discrimination in the * * * rental, * * * of housing on the basis of race, color, * * * or national origin * * *."

See Govt's Attachment 5 in Opposition to Defendants' Motion to Dismiss, pp. 13-14.

Defendants' Defense

Defendants maintain that their race-conscious practices at Starrett City were adopted at the behest of the State solely to achieve and maintain integration and were not motivated by racial animus. Crediting fully defendants' stated intentions, it is clear that their treatment of blacks and other minority persons constituted a clear violation of the Fair Housing Act. As previously noted, Starrett City tenant selection practices have always limited blacks and hispanics to far fewer apartments than would be expected if race and national origin were not taken into account in the tenant selection process.

In further support of their rental practices, defendants have submitted the written testimony of three experts in the housing field. The Court has studied their testimony and opinions carefully. Oscar Newman, an architect and city planner, in brief summary stated that Census Bureau figures in 1980 showed blacks forming 11.7% of the population, 75.9% living inside urbanized areas, of which 75.4% live in central cities, in contrast to only 42.1% of whites. Between 1960 and 1982 the num-

ber of black families with children under 18 increased from 20.7% to 46.5%. The comparable figure for white families was 15.0% in 1982. The average income for all black families with children is 56% of the average for white families. However, with two working partners, income increased to 84% of that of white families with two working parents. In 1978, 52.4% of blacks had completed less than 12th grade, compared with 32.1% for whites. The unemployment rate for blacks is significantly higher than for whites. Among black teenagers it hovers about 50%.[2]

Newman has observed that as communities become both poor and predominantly black, gradual abandonment occurs. Examining the Starrett City area, he found that neighborhood residential areas that had become more than 50% black also suffered a serious loss in total population. Thus, East New York, 70% black in 1970, lost 33,000 (36%) by 1980, and Brownsville, 72% black in 1970, lost 25,000 (35.5%)

The loss of white residents resulting in the transition of a community to a predominantly black population is commonly referred to as "tipping". Newman acknowledges that the "tipping point is a quantity that is difficult to predict with precision. It has been variously estimated, in different facial contexts, as ranging from a low of 1% black to a high of 60% black." He adds, however, that "Most social scientists and housing experts agree that under normal circumstances tipping begins to occur at between 10% and 20% black occupancy." Still, he acknowledges that "the tipping point for a particular housing development, depending as it does on numerous factors and the uncertainties of human behavior, is difficult to predict with precision." As the Court has already noted, the tipping "uncertainties" did not deter defendants from increas-

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2 According to a New York City housing survey in 1984, the problem of decent housing for blacks and other minorities was complicated by the fact that 57,000 rental units were converted to cooperative housing, which limited rental opportunities for blacks and minorities. A similar situation was noted in Brooklyn, where the house count remained unchanged but reflected a decline of 9700 renters and an increase of 11,900 new homeowners. In the same period the incomes of black renters increased by 20%, which brought the median to 63%, as high as whites. Govt. Exh. 37.

ing the minority ratio to 35% over a 5-year period in order to relieve themselves of the *Arthur* litigation.

Dr. Kenneth Clark, a social psychologist and author of more than 130 works dealing with equal rights and the problems confronting blacks, was retained in 1979 by the New York State Division of Housing and Community Renewal (DHCR) to conduct a study concerning integration at Starrett City. Based upon his research for the State and his survey of "tenant perceptions", he concluded, in an affidavit on behalf of defendants, that the percentage of minorities which could trigger tipping "is probably around 40% on a population basis."

His report, to the State issued in January 1980, entitled *Starrett City: A study of Ways of Maintaining an Integrated Residential Community*, is Exhibit C to his affidavit. Referring to the New York State Human Rights Law, N.Y. Exec. Law § 292 subd. 19 (McKinney's 1982), which states that "the term 'discrimination' shall include *segregation* and *separation*", Dr. Clark advocates that it is "imperative to define discrimination in terms of preventing segregation and separation." He recognizes, however, that federal law—as well as state and local housing legislation—prohibits discrimination on the basis of race, and that none give any affirmative mandate to integrate.

According to Dr. Clark, "[t]he primary aim of the Starrett City Plan was to attract white ethnic tenants" as stated in the 70/30 goal appearing in the marketing plan. He also notes "that after filling the initial vacancies, a waiting list in chronological order by date of application would be kept." If by that statement, it was Dr. Clark's understanding that it was Starrett's future intention to fill vacated apartments on an open occupancy basis, it was certainly not followed. As heretofore noted, blacks and hispanics have always been limited to far fewer available apartments than would be expected, if race and national origin were not taken into account. As Dr. Clark noted, "[t]he goal of [HUD marketing regulations] is to seek means of obtaining and maintaining an integrated community without resorting to arbitrary discrimination." The 30% limitation placed on black and other minority applicants appears all the more arbitrary when, as Dr. Clark's study for the State reveals, non-whites at Starrett City have the same educational

level as whites (just beyond high school), and the median earnings of the minority respondents are appreciably higher, viz., $15,294 as compared with $13,400 for the white tenants. *See* Exh. C. to Clark affidavit at 29.

Furthermore, the same sample of white and minority residents established that Brooklyn was the place of previous residence for the greater proportion of minority (75.6%) and white (69.8%) Starrett City residents. Moreover, two out of every three (66%) received rent subsidies: two of every five whites (40%) and one of four minority (26%). In the 40-64 age group, one in five (19%) of the whites and one in twelve (8.3%) of the minorities were subsidized. In the over-65 group, 66.6% of the whites and 60% of the minorities received subsidies.

Moreover, the same sample suggested that minority tenants resided longer at Starrett City than whites. The average number of years for all tenants was 2.58: for whites, 2.0 years and for minorities 2.6 years. One-third (31.8%) of the whites in the 25-39 age group had lived there one year or less. In the over-65 group, 41% of whites and 60% of minority had lived there more than three years, and none less than a year.

The sample also reflected that nearly half of the white respondents (46%) were not put on a waiting list as prospective renters, whereas only one in four of minority applicants were not. One in five of the minorities (18.9%) waited one year and one in 9 (10.8%) waited two years or more before being placed. In contrast, one in 25 of whites (3.5%) waited one year, none waited two years, and less than 50 (1.6%) waited two years or more.

A third study of a sample of 300 black representatives of households in Starrett City by Dr. Clark's organization (Exh. D to his affidavit) focused on 1) their views about residential integration, 2) their perceptions and expectations of racial integration at Starrett City, 3) the relation between their perceptions and expectations of housing integration and their decisions to remain or move, and 4) their views as to the options management might exercise to achieve and maintain racial integration at Starrett City. A key finding of the study indicated that the great preponderance of black residents strongly affirm residential integration, four out of five stating it was important to their

decision to move to Starrett City. However, when it came to the extent of integration, the proportion of blacks and other minorities most frequently cited was 40 to 50 percent. Similarly, when asked "If you knew that the waiting list was predominantly black, would you favor management accepting new tenants . . . without regard to race?", a nonrestrictive policy was favored by 58.3%.

The foregoing sample of black residents were predominantly in the prime age category. The median age was slightly over 45, one in five was between 50 and 65, and one in four was 65 and over. Further, the sample was heavily weighted with females, quite well educated persons and white collar workers, placing them in the middle class (45.5%), upper middle (6.9%) and lower middle (8.3%). The sample was evenly divided between those who were married and those in the single, divorced, separated and widowed categories. Regarding level of education, 59.3% held a high school diploma and some college (including trade school) and 12.3% held a four-year college degree or more. Regarding income, 37.3% were in the under $15,000 category, 36.3% were in the $15,000 to $25,000 category, and 11.1% were in the $25,000 plus category. Other tenants (15.3%) declined to reveal their income. Regarding occupation, 27.7% were in the professional, managerial or proprietor class; 7.3% were in clerical or sales; 4.7% were skilled craftsmen; 4.0% were unskilled operative; 5.7% were service workers; 4.0% were in City service; and 39.0% were in the homemaker, retired, unemployed or student categories.

The third expert relied on by defendants, Morris Milgram, has been involved in integration efforts since the 1950's. His early efforts to establish small group housing developments in Philadelphia, Princeton, N.J., and Delaware convinced him that a 55%/45% goal did not satisfy whites, who soon left the Philadelphia development, which eventually became 96% black. However, in another development in all-white northeast Philadelphia, consisting of 19 single-family homes, a 2/3 majority-1/3 minority proved successful. Again, in 1962-64, his group purchased high-rise apartment buildings in Washington, D.C. and neighboring Silver Spring, all of which were integrated without incident. These acquisitions were made, how-

ever, prior to the enactment of the Fair Housing Act. Moreover, the 30% ceiling has already been breached by defendants in order to settle the *Arthur* lawsuit; and Milgram himself has written that "large-scale racial integration in housing requires (1) total open occupancy allowing minorities complete access to all housing. . ." Milgram, *Good Neighborhood: The Challenge of Open Housing* (New York, Norton, 1977: 208).

The Government's Position

The government contends that defendants have continually violated sections 804(a), (b), (c) and (d) of the Fair Housing Act, 42 U.S.C. § 3604(a), (b), (c) and (d), by their consistent practice of making unavailable to blacks and hispanics rental apartments which are then made available to whites; and by conditioning rental to minorities on the basis of a "tipping" formula that depends solely on the race or national origin of other tenants at Starrett City. As a consequence, minority applicants must wait up to ten times as long as the average white applicant for an apartment. In addition, employees of defendants are instructed to rent apartments by favoring white applicants in order to maintain a racial balance among tenants. Moreover, defendants send a letter to each applicant placed on the waiting list stating that "at this time an apartment is not available for you", which remains operative until the applicant is invited to come in to complete the processing for an apartment. To the extent that apartments are in fact available but are being reserved for white applicants, the representation of unavailability to qualified black and hispanic applicants is prohibited conduct condemned by the statute.

The government further contends that even if HUD had approved defendants' Affirmative Fair Housing Marketing Plan, that would not permit "the use of managed waiting lists to achieve integration." Nor would the fact that HUD representatives made "numerous visits to Starrett City . . ." and "knew that integration could not be maintained . . . without the use of race as a factor in the renting of apartments." Indeed, as the government points out, this Court has previously noted that

HUD "[s]trongly disavowed . . . Starrett's apparent assumption that HUD supported racially based tenant selection practices at Starrett City." *See United States v. Starrett City Associates*, 605 F. Supp. 262, 264 n.3 (E.D.N.Y. 1985).

Furthermore, as the government points out, even assuming that HUD officials had given approval to defendants' discriminatory practices, defendants would not be insulated from the consequences of their acts. Although the Supreme Court recently spoke to this issue in a different context, *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51 (1984), declining to adopt a flat rule that the government may never be estopped under any circumstances, it acknowledged that strong arguments could be made in support of such a rule, stating,

> "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."

Id. at 60. This Circuit has similarly held that equitable estoppel is available against the government only "in the most serious of circumstances." *United States v. Repass*, 688 F.2d, 154, 158 (2d Cir. 1982). And more recently a district court in this Circuit held that "HUD has no power to excuse discriminatory acts or to waive, on behalf of those injured by them, the right to seek a remedy." *United States v. Yonkers Bd. of Education*, 624 F. Supp. 1276, 1375 (S.D.N.Y. 1985).

The Purpose of the Fair Housing Act

The Fair Housing Act requires no critical exegesis to make its meaning clear. In plain language, it is a "*prohibition* against discrimination in the sale or rental of housing", with exceptions not here relevant. Affirmatively, its purpose was, as stated by its principal sponsor Senator Mondale, the "Outlawing [of] discrimination in the sale or rental of housing . . . " and the

gradual prohibition of "discrimination on account of race, color, religion or national origin in the sale or rental of housing." 114 Cong.Rec. 2272 (1968). As he further pointed out, the source of that prohibition is the Fourteenth Amendment, which in its Equal Protection Clause forbids a State to deny any person within its jurisdiction the equal protection of the laws. *Id.* at 2273.

Although the Fair Housing Act does not in terms so state, the Supreme Court "has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977) (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)). But *Trafficante* was brought to restrain such unlawful practices as "manipulating the waiting list for apartments, delaying action on . . . applications, using discriminatory acceptance standards and the like." 409 U.S. at 208, which prompted the government to bring this action. Thus, the gloss placed upon the Act by its principal sponsor regarding the importance of integrated living, and the Supreme Court's approval of interracial association, cannot lawfully be interpreted to mean that where a large housing complex such as Starrett City is concerned, black and other minority applicants who are qualified cannot obtain available apartments on an equal basis with whites but must remain subject to the landlord's quota.

The use of a rigid quota, however, as employed by defendants is not lawful, as was made clear in *Williamsburg Fair Housing Committee v. New York City Housing Authority*, 493 F. Supp. 1125 (S.D.N.Y. 1980). In that case, the court granted a permanent injunction barring project managers from using a rigid quota which assigned 75% of project apartments to whites, 20% to hispanics and 5% to blacks. As the Court pointed out,

> "Such a non-White family would, at least for a time, have been denied an apartment for which it was eligible. Stated differently, that family would have been discriminated

against in the privileges of a rental. Title VIII requires no more to establish a violation. 42 U.S.C. § 3604(b)."

Id. at 1248.

The Otero Case

The Starrett defendants rely heavily on *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), which arose from a controversy over the allocation of apartments in newly constructed housing in the lower East Side of Manhattan, built for the New York City Housing Authority. The *Otero* plaintiffs, former residents of razed housing in that area, had been given first priority for apartments in the new housing pursuant to the Authority's regulations. Controversy arose when the *Otero* plaintiffs learned they were being allotted less than half of the 360 available apartments in order to provide housing for non-former site occupants. The district court concluded, in view of the Authority's affidavit that the surrounding area population was approximately 48.3% white and 51.7% non-white, that the situation was "not one in which an influx of non-whites may provoke the 'tipping' of a previously integrated neighborhood, since by definition former site occupants are persons who originally resided in the neighborhood . . ." *Id.* at 1128-30. Accordingly, the district court granted summary judgment in favor of the plaintiffs.

On the Authority's appeal, the Court recognized that "the community is presently integrated, with a racial balance that is almost equally divided between white and non-white residents, but the housing authority seeks to stem a steady decline in the percentage of the white population in the community." *Id.* at 1124. Nonetheless, the Court observed that "the Authority's denial of housing to a family because of its race could, whether or not labelled a 'benign' quota, constitute a form of unlawful racial discrimination in violation of the family's constitutional rights. For these reasons the burden on the Authority is a heavy one." *Id.* at 1136.

The appellate Court's focus on "constitutional rights" in *Otero* is of no assistance to defendants. The Fair Housing Act, undergirded by the Fourteenth Amendment, is the basis of the

government's case here, and the source of the rights of black and other minority applicants to be treated on the same basis as whites in seeking available housing at Starrett City. The defendants, as private landlords, are not clothed with governmental authority. Their obligation is simply and solely to comply with the Fair Housing Act.

The Government's Motion For Summary Judgment

The Court has minutely reviewed the extensive submissions of the parties and has concluded that the government's challenge to Starrett City's tenanting procedure is correct. Defendants cannot arrogate to themselves the powers of the New York City Housing Authority described in the *Otero* case, which could grant or deny housing subject only to State or Federal law, as in *Williamsburg Fair Housing Committee, supra.* The applicable law in this case is clearly Title VIII, 42 U.S.C. § 3604, and not the constitutional cases discussed in *Otero* and relied on by defendants.

Defendants were not authorized to treat the so-called "tipping" phenomenon as a basis for denying minority applicants the same rights white applicants enjoyed with respect to obtaining apartments at Starrett City. Their own expert, Oscar Newman, acknowledged the wide elasticity of that standard, which ranged "from a low of 1% black to a high of 60% black." Indeed, defendants had no difficulty stretching their quota to 35% when it became necessary to avoid litigating the private *Arthur* lawsuit which threatened their unlawful rental practices.

Defendants' disregard of the requirements of the Fair Housing Act is all the more difficult to understand in light of the findings of their other expert, Dr. Kenneth Clark, based on his survey of black tenants living in Starrett City. They reveal that Brooklyn was the place of residence of the greater proportion of both minority and white tenants. Even more revealing was the finding that white tenants are more subsidized than minority tenants; that the black tenants included substantial numbers of high school and college educated persons; that about a third of the sample survey indicated that their earnings were under $15,000 a year, another third were in the $15,000 to $25,000 cat-

egory, and 11% were in the $25,000 plus category. Another 15% declined to reveal their income. Regarding occupation, 27.7% were in the professional, managerial or proprietor class; 7.3% were in clerical sales; 4.7% were skilled craftsmen; 4.0% were unskilled operative; 5.7% were service workers; 4.0% were in City service; and 39% were in the homemaker, retired, unemployed or student categories.

Defendants, as private landlords, were not empowered to establish quotas limiting the number of apartments to be made available to eligible minority applicants, in disregard of the Fair Housing Act. Nor were they entitled to hold off the market vacant apartments, which could have been rented to eligible minority applicants, solely to insure occupancy by white persons. Defendants admit that they treat black and hispanic applicants differently than white applicants on the basis of their race and national origin. Such differential treatment violates the Fair Housing Act whatever its motivation.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that the plaintiff, United States of America, have judgment against the defendants as follows:

(1) Permanently enjoining defendants from discriminating against black, hispanic and other minorities on the basis of race, color, or national origin in connection with their applications for available apartments at Starrett City.

(2) Requiring defendants to inform their agents and employees of their policy of nondiscrimination and of their duties under this order and the Act.

(3) Requiring defendants to take steps to notify black, hispanic and other minority applicants presently on the waiting list, future applicants, and the public, of their policy of nondiscrimination.

(4) Requiring defendants to adopt written, objective, uniform, nondiscriminatory tenant selection standards and procedures to be approved by the United States and this Court.

(5) Requiring defendants to maintain recordkeeping and reporting to enable the United States to monitor compliance with this order.

(6) Jurisdiction shall be retained in this Court for a period of three years.

The Clerk is directed to enter judgment accordingly this 5th day of May, 1987.

SO ORDERED.

/s/ EDWARD R. NEAHER
Edward R. Neaher
United States District Judge

Copies of this Opinion and Order are being forwarded to counsel for the parties.

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 84-2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Defendants.

JUDGMENT

A memorandum and order of Honorable Edward R. Neaher, United States District Judge, having been filed on May 6, 1987, directing the Clerk of Court to enter judgment in favor of the plaintiff, United States of America, and against the defendants as follows:

(1) Permanently enjoining defendants from discriminating against blacks, hispanics, and other minorities on the basis of race, color, or national origin in connection with their applications for available apartments at Starrett City.

(2) Requiring defendants to inform their agents and employees of their policy of nondiscrimination and of their duties under this order and the Act.

(3) Requiring defendants to take steps to notify black, hispanic, and other minority applicants presently on the waiting

list, future applicants, and the public of their policy of nondiscrimination.

(4) Requiring defendants to adopt written, objective, uniform, nondiscriminatory tenant selection standards and procedures to be approved by the United States and this Court.

(5) Requiring defendants to maintain recordkeeping and reporting to enable the United States to monitor compliance with the order.

(6) Jurisdiction shall be retained in this Court for a period of three years.

ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, United States of America, and against the defendants as follows:

(1) Permanently enjoining defendants from discriminating against blacks, hispanics, and other minorities on the basis of race, color, or national origin in connection with their applications for available apartments at Starrett City.

(2) Requiring defendants to inform their agents and employees of their policy of nondiscrimination and of their duties under this order and the Act.

(3) Requiring defendants to take steps to notify black, hispanic, and other minority applicants presently on the waiting list, future applicants, and the public of their policy of nondiscrimination.

(4) Requiring defendants to adopt written, objective, uniform, nondiscriminatory tenant selection standards and procedures to be approved by the United States and this Court.

(5) Requiring defendants to maintain recordkeeping and reporting to enable the United States to monitor compliance with the other.

(6) Jurisdiction shall be retained in this Court for a period of three years.

/s/ ROBERT C. HEINEMANN
Robert C. Heinemann
Clerk of Court

Dated: Brooklyn, New York
May 7, 1987

FILED: May 11, 1987

APPENDIX H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

84 Civ. 2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC. AND DELMAR MANAGEMENT COMPANY,

Defendants.

MEMORANDUM AND ORDER

Upon application of defendants Starrett City Associates, Starrett City, Inc. and Delmar Management Company, the 60-day stay of this Court's Order of May 6, 1987 now set to expire on July 6, 1987 is extended for ten days through and including July 16, 1987. No further extensions of this stay will be granted by this Court.

It is understood that the Starrett defendants will be making an application to the Court of Appeals for the Second Circuit, at the time of oral argument of their appeal in this action, for a continuation of the stay pending that Court's determination of said appeal and this order is without prejudice to that application.

So Ordered.

/s/ EDWARD R. NEAHER

Edward R. Neaher,
United States District Judge

FILED: June 30, 1987

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

79 Civ. 3096 (ERN)

MARIO ARTHUR, HAROLD DEPASS, ANN LONG, and JOSEPH PERCIVAL, individually and on behalf of all others similarly situated,

Plaintiffs,

DIANE HERNDON, individually and on behalf of all others similarly situated,

Plaintiff-Intervenor,

—against—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., DELMAR MANAGEMENT COMPANY and YVONNE SCRUGGS-LEFTWICH, Commissioner, State of New York Division of Housing and Community Renewal,

Defendants.

STIPULATION OF SETTLEMENT AND CONSENT DECREE

The parties to this action hereby agree to settle and discontinue this action, subject to the approval of the District Court, as follows:

DEFINITIONS

1. "Commissioner" means the New York State Commissioner of Housing and Community Renewal.

2. "Decree" means this Stipulation of Settlement when entered as an order of this Court and the "date" of the Decree means the date of such entry.

3. "DHCR" means the New York State Division of Housing and Community Renewal.

4. "Covered DHCR Project" means a rental or cooperatively owned housing project within New York City in which minorities constitute less than 20% of the occupancy by units, other than a project exclusively for either senior citizens or hospital staff, and which is subject to the supervision of the Commissioner and the DHCR pursuant to Articles II and IV of the Private Housing Finance Law of New York. This Decree does not concern housing other than projects defined in this paragraph.

5. "May" does not mean "must" or "will" and, with respect to the Commissioner and the DHCR, denotes discretion and does not limit or create duties of the Commissioner or of the DHCR under the Decree or otherwise.

6. "Minority" and "minorities" refer to persons who are not white, but include Hispanics.

7. "Plaintiff Class" means those persons who: (a) are on the waiting list for apartments at Starrett City as of the date this Stipulation of Settlement is submitted to the District Court for its approval; and (b) are included in the class certified by this Court's order of June 22, 1983.

8. "Plaintiffs' Counsel" means the single attorney plaintiffs' attorneys will designate for purposes of the reporting provisions of this Decree.

9. "Party" means a party to this Stipulation and Decree.

10. "Starrett Defendants" means Starrett City Associates, Starrett City, Inc., and Delmar Management Company, and their successors and transferees in interest, the general partners of Starrett City Associates, and their officials and their successors in office, and the agents and employees of all of the above.

PREAMBLE

11. Plaintffs filed their complaint in this action on December 5, 1979. On June 22, 1983, the District Court certified the plaintiff class.

12. Plaintiffs alleged that the tenant selection practices used by the Starrett defendants and approved by the Commissioner discriminated against them on the basis of race in violation of federal and state law.

13. Defendants denied plaintiffs' allegations and asserted that their practices were required to maintain integration at Starrett City and were authorized by law.

14. The Court has made no findings of violation of law or of the legality of the practices complained of. No party, by entering into this settlement, admits or is deemed to admit any violation of law or the legality of the practices complained of at Starrett City.

15. Part C shall only apply to covered DHCR projects and the Decree shall not be used as evidence of policy, practice, authority or obligation of the DHCR or the Commissioner in other judicial or administrative actions or proceedings.

16. All parties agree that, consistent with this stipulation, the Starrett defendants will increase minority access to Starrett City and the Commissioner will increase minority access to other DHCR-supervised projects in New York City. This will be done in a way consistent with achieving or maintaining stably integrated housing developments and communities. Nothing in this Decree is intended to affect eligibility criteria at Starrett City or other DHCR-supervised projects.

17. The parties, mindful that voluntary and cooperative resolution of housing discrimination actions is preferred, have agreed that:

(a) plaintiffs will withdraw with prejudice any and all claims they have against defendants;

(b) to the extent permitted by law, the Starrett defendants, in renting vacant apartments at Starrett City, will continue to use controlled tenant selection on the basis of race;

(c) the Starrett defendants will increase the percentage of units rented to blacks and Hispanics at Starrett City, as set forth in Part A; and

(d) the Commissioner and DHCR will establish an open access program to increase the availability of housing for the plaintiff class and other minorities, as set forth in Part C.

18. The Court has made no findings of fact except those set forth below in the "Findings of Fact" section.

FINDINGS OF FACT

19. Starrett City is a 5,881-unit, 46-building rental project built on previously undeveloped land in Brooklyn, New York and owned by Starrett City Associates, a limited partnership organized in New York.

20. Starrett City, Inc., is a limited profit housing corporation organized under Article II of the Private Housing Finance Law of New York and a general partner of Starrett City Associates.

21. Delmar Management Company is the managing agent for Starrett City.

22. Starrett City is a stable, well-maintained, well-managed development that for nearly ten years has served an integrated tenant population, at levels of minority participation that rank very high among integrated, DHCR-supervised projects in New York City. Starrett City has extensive services and amenities on site and constitutes a distinct neighborhood with its own sense of community.

23. DHCR is one of the agencies of the State of New York charged with supervisory responsibilities over Starrett City.

24. The Starrett defendants, to further and maintain racial integration at Starrett City, openly control tenant selection on the basis of race. For several years, they have maintained a ten-

ant population that is approximately 64% majority and 36% minority, by apartment units. Throughout this period, approximately 21% of the total number of apartment units have been occupied by blacks, and approximately 8% by Hispanics. The 1980 census shows that Starrett City's population, by persons, is approximately 55% majority and 45% minority. According to the census, 14.5% of the persons living at Starrett City are Hispanic, and 20.3% are non-Hispanic blacks.

25. For purposes of this Decree, the racial composition of Starrett City, by units, as of January 31, 1984, was:

	Units	*%*	
White	3,743	64.7	
Black	1,206	20.8	
Hispanic	459	7.9	
Oriental	259	4.5	
Other (including mixed couples)	118	2.0	
	5,785	99.9%	(due to rounding error)

In addition, 24 units were used as offices, and 72 were vacant.

26. DHCR was aware of the controlled tenancy at Starrett City and supported that method of tenant selection as necessary to maintain integration there.

27. In 1979, plaintiff class, consisting of black applicants to Starrett City who, because of the controlled tenancy policy, have waited considerably longer, on average, than white applicants for apartments, commenced this action to challenge controlled tenant selection based on race as contrary to federal and state law. In addition, individual named plaintiffs raised claims of other allegedly discriminatory practices distinct from the overt controlled tenancy policy.

28. Minorities constitute a substantial majority of Starrett City's waiting list. This has been true throughout Starrett City's history. For example, an audit of Starrett City's waiting list conducted by the United States Department of Housing and Urban Development ("HUD") between January 29, 1979 and

February 16, 1979, determined that there were then 8,530 families on the eligible waiting list, whose racial composition was as follows:

White	—	23.4%
Black	—	47.4%
Hispanic	—	11.4%
Oriental	—	2.8%
Other	—	3.6%
Unidentified	—	11.4%
		100.0%

More recently, since February 1, 1981, HUD regulations have required that Starrett City maintain a log book of all applications received, with an indication of whether the applicant is of majority or minority status. The log reflects the following data:

	No. of Applications	*Racial Composition (%)*		
Period	*Received*	*Majority*	*Minority*	*Not Identified*
2/1/81-1/31/82	7,522	27%	60%	13%
2/1/82-1/31/83	4,956	24%	63%	13%
2/1/83-1/31/84	5,027	24%	67%	9%

29. Because of controlled tenant selection, applicants for apartments at Starrett City, including minority applicants, are not processed in chronological order. As a consequence, the average waiting time for minority applicants is longer than the average waiting time of white applicants. During the summer of 1981, a survey was conducted of the leases and the corresponding application cards for every tenth apartment at Starrett City. This sampling produced the following results with respect to the average waiting time by race and bedroom size:

	1 Bedroom	*2 Bedroom*	*3 Bedroom*
White	4 mos.	2 mos.	2 mos.
Black	11 mos.	20 mos.	16 mos.
Hispanic	5 mos.	4 mos.	9-1/2 mos.
Oriental	1 day	1 day	1 week

30. The existence of discrimination and segregation in the housing market in New York City severely restricts the apartments available to minorities. This constricted market causes an increased minority demand for housing at Starrett City. Several other DHCR-supervised projects in New York City have very small or nonexistent minority populations. The program to open access to covered DHCR projects, as provided by this Decree, is intended, in part, to decrease the minority demand for apartments at Starrett City by opening up other apartments previously unavailable to the plaintiff class and other minorities. These newly-created housing opportunities at covered DHCR projects for minorities should reduce the waiting times for the plaintiff class and other minority applicants at Starrett City.

OPERATIVE PROVISIONS

PART A

31. To the extent permitted by law, the Starrett defendants will continue to maintain racial integration through controlled tenant selection on the basis of race so long as they comply with and carry out their obligations under the other paragraphs of this Part and of Part B. All parties agree that the ultimate goal at Starrett City is maintenance of an integrated community without resort to controlled tenanting.

32. In light of this Decree, which terminates the current legal controversy, the Starrett defendants agree to increase minority access to apartments at Starrett City in the manner described in this paragraph. The Starrett defendants will increase the number of units occupied by black and Hispanic tenants by 175 units. They will do so within 5 years from the effective date of this Decree, at an annual rate of increase of at least 35 units, subject to the actual availability of vacant units. The additional units for blacks and Hispanics will be divided between the two groups in approximately the proportion that the groups bear to each other, on a unit basis, in the current Starrett City population. Of the total black and Hispanic population now living at

Starrett City, blacks represent 72.5% and Hispanics 27.5%, on a unit basis.

33. A vacant unit will not be deemed unavailable for minority occupancy, unless placement of a minority tenant in that unit will increase the minority population of a particular building, on a unit basis, to a level more than 3% above the then-current minority population of Starrett City as a whole, on a unit basis.

34. The Starrett defendants will not permit the proportion of units occupied by black and Hispanic tenants to decline because of an increase in the occupancy rate. If the occupancy rate increases, the number of units occupied by black and Hispanic tenants will be increased accordingly. Once Starrett City has complied with the provisions of Paragraph 32, the percentage of units occupied by blacks and Hispanics will not be reduced below the percentage required by Paragraph 32, as calculated by reference to the current occupancy rate (i.e., the percentage will not be reduced below 31.8%).

35. In complying with the provisions of Paragraphs 32 and 34, the Starrett defendants will not decrease the percentage of units occupied by other minorities, subject to availability of qualified applicants, and will take affirmative efforts to maintain at least the present percentage of other minorities.

36. The Starrett defendants will continue building maintenance, services, and management at the same standards as heretofore.

37. The Starrett defendants will comply with all rules and regulations of the DHCR: Provided, however, that, should there be any inconsistency between such rules and regulations and the provisions of this Decree, the provisions of this Decree will govern.

38. For a period of 5 years following the date of this Decree, the Starrett defendants will provide to plaintiffs' counsel and to defendant Commissioner a monthly report, in a form substantially similar to the form attached as Exhibit A and entitled "Ethnic Breakdown of Occupied Buildings in Starrett City,"

reflecting, in both absolute numbers and percentages, the racial and ethnic composition, on a unit basis, of Starrett City's population and of each of Starrett City's residential buildings. Thereafter, for a period of 5 years, the Starrett defendants will provide similar reports on an annual basis.

39. The Starrett defendants, in recognition of costs incurred as a result of participation in this lawsuit, including preparation for, and attendance at, their pretrial depositions, will pay the sum of $250 to each of the following: Mario Arthur, Harold DePass, Ann Long, Joseph Percival, and Diane Herndon.

PART B

40. Wherever notification of plaintiff class is provided for herein, the Starrett defendants will be responsible for all administration, mailing and costs relating to the distribution of such notification.

PART C

Minority Access Program

41. DHCR will undertake a program to achieve the goal of 20% minority occupancy, by units, in covered DHCR projects within 15 years.

42. Within 180 days of the date of this Decree, the Commissioner will cause to be published in the State Register, in the manner prescribed by the New York State Administrative Procedure Act, a proposed regulation which provides:

(a) That the Commissioner determines that, in view of the state support of and assistance to the covered DHCR projects and of the purposes of said support and assistance, and of relevant state and federal laws with which the DHCR and the Commissioner are authorized or required to obtain compliance, and of the unique circumstances of the present housing market in New York City, the Commissioner and the DHCR will undertake an enforcement program to eliminate unlawful discrimination, to promote housing opportunities for minorities, and to promote integration in covered DHCR projects.

(b) That the Commissioner establishes a goal of 20% minority occupancy, by units, in all covered DHCR projects within 15 years. This goal may not be used as a ceiling to limit or exclude minorities.

(c) That, within 90 days of the effective date of the regulation, DHCR will identify all covered DHCR projects and invite each covered DHCR project to submit a voluntary open access program, acceptable to the Commissioner, to achieve a goal of 20% minority occupancy, by units, within 15 years, which goal may not be used as a ceiling to exclude minorities.

(d) That, if a covered DHCR project has not submitted an acceptable voluntary open access program within 60 days of the invitation to do so, DHCR will conduct an investigation to determine whether the covered DHCR project has impermissibly excluded or discriminated against minorities as defined by paragraphs 43 and 44, below.

(e) That, the investigation pursuant to subparagraph (d) above will include a review of the covered DHCR project's tenant selection practices, waiting lists, marketing and such other factors as the Commissioner may deem relevant. The Commissioner will provide an appropriate opportunity for presentations or argument by the covered DHCR project.

(f) That, within 180 days of the inception of an investigation of a covered DHCR project, the Commissioner will make preliminary findings whether there is probable cause to believe that the covered DHCR project has impermissibly excluded or discriminated against minorities as defined by paragraphs 43 and 44, below.

(g) That, where such probable cause has been found, the Commissioner will provide the covered DHCR project an opportunity to submit a voluntary open access program, acceptable to the Commissioner, to achieve a goal of 20% minority occupancy, by units, within 15 years, which goal may not be used as a ceiling to exclude minorities, or to rebut the finding of probable cause by a preponderance of the evidence, through procedures the Commissioner deems appropriate.

(h) That, after the receipt of rebuttal evidence or argument by the covered DHCR project, or upon a failure of the covered DHCR project to offer rebuttal or to submit an acceptable voluntary open access program, the Commissioner will determine whether minorities have been impermissibly excluded or discriminated against as defined by paragraphs 43 and 44, below, and will enter an order setting forth her finding. The steps set forth in this subparagraph (h) together with those set forth in subparagraph (g) immediately above will be completed within a total of 180 days after the finding of probable cause.

(i) That, to remedy impermissible exclusion of or discrimination against minorities, the Commissioner will order the covered DHCR project to implement an open access program to achieve a goal of 20% minority occupancy, by units, in no more than 15 years (which goal shall not be used as a ceiling to exclude minorities).

43. The regulation will further provide that the Commissioner will find that the covered DHCR project has impermissibly excluded or discriminated against minorities if she finds any one or combination of the following:

(a) housing discrimination against minorities other than acts covered by subparagraph (d) below;

(b) failure to comply with those parts of DHCR's regulations, on Equal Opportunity and Fair Housing in Projects of Regulated Housing Companies, which came into effect on July 7, 1982 (N.Y.S. Register, Aug. 4, 1982, p. 10; N.Y.S. Register, June 2, 1982, pp. 4-6);

(c) failure to comply with other DHCR regulations relating to tenant selection practices, waiting lists, and marketing, as codified in 9 N.Y.C.R.R. Part 1727 and in effect at the time of the failure to comply, with the foreseeable consequence of limiting or excluding minorities from the project; or

(d) an act or failure to act which had the foreseeable consequence of limiting or excluding minorities from the project. The Commissioner will find such an act or failure to act if the covered DHCR project:

(i) upon creation or reopening of a waiting list, failed to advertise the availability of applications or apartments in newspapers of general circulation; or

(ii) upon creation or reopening of a waiting list, failed to advertise the availability of applications or apartments in a widely read minority newspaper; or

(iii) failed to include a statement of non-discrimination or equal housing opportunity in advertisements of the availability of applications or apartments; or

(iv) conducted systematic outreach but failed to conduct outreach to minority groups or in minority communities; or

(v) had a preference for admission to the project for family members or relatives or friends of tenants or cooperators.

The above list does not limit the Commissioner's discretion to find such an act or failure to act, under this subparagraph (d), under other circumstances.

44. (a) If the Commissioner finds an act or failure to act under subparagraph 43(d), she will find impermissible exclusion of or discrimination against minorities unless, in a given case based on her review of all the facts, she has a substantial basis for finding otherwise. In such a case, she will set forth the specific reasons that support her finding.

(b) Subparagraph 43(d) above need not be invoked by the Commissioner unless and until she completes her investigation of a covered DHCR project for possible violations under subparagraphs 43(a), (b) and (c).

(c) If paragraph 43(d) is judicially determined to be impermissible, it will not be the basis for requiring affirmative steps and such steps must then be based solely on acts or omissions identified pursuant to subparagraphs 43(a), (b) or (c) and such action by the Commissioner will satisfy in full the Commissioner's obligations under the Decree.

45. Among the open access programs that may be developed and approved by the Commissioner pursuant to subparagraphs 42(c), (g) and (i) are:

(a) creation of a minority waiting list for a particular covered DHCR project accompanied by a specific affirmative marketing effort designed to assure that minorities learn of the creation of such list. The list would operate for a specified period of time, or until a specified number of vacancies have been filled, in tandem with another waiting list. Eligible applicants for all apartments are to be selected to rent or purchase apartments as they become available from the tandem lists pursuant to a formula designed for that particular project to reach the goal of 20% minority occupancy by units within 15 years. The Commissioner, until this goal has been achieved, may limit or suspend priorities for internal transfers of existing tenants in a manner consistent with the objectives of this Decree, subject to health and tenant welfare considerations.

(b) voiding of existing waiting lists and replacement of said lists with new lists created in accordance with the Commissioner's Affirmative Fair Marketing regulations and such additional requirements as the Commissioner may deem appropriate in the circumstances, which requirements may include use of random selection methods for responding to requests for applications, for selection of applications for placement on a new waiting list, or for ranking applicants on such a list.

46. In consideration or selection of appropriate voluntary or ordered open access programs, remedies and goals, the Commissioner may take into account factors such as the number, proportion and distribution of minorities on a covered DHCR project's waiting list, the existing number, proportion and distribution of minority tenants, the character and location of the neighborhood and project turnover rates.

47. Notwithstanding subparagraphs 42(b), (c), (g) and (i) and any other provisions of this Decree, nothing in this Decree obligates the Commissioner to require that vacant units at a covered DHCR project under an open access program be filled

with minorities at a rate faster than two (2) minority tenants for every five (5) vacancies.

48. The Commissioner is not required by this Decree to designate or set aside specific apartments in covered DHCR projects for occupancy by persons of a particular race or to hold apartments vacant or off the market.

49. For seven years after the effective date of this Decree, the Commissioner will notify plaintiffs' counsel at least 10 days prior to the process of creating a new waiting list at a covered DHCR project under the terms of the Decree. In addition, the Commissioner will arrange with the Starrett defendants to provide notice in accordance with this paragraph to members of the plaintiff class at least 10 days prior to the distribution of applications for new waiting lists to be created at covered DHCR projects. For the period from the date of this Decree until one year after the beginning of the implementation of the first open access program at a covered DHCR project, the Starrett defendants will notify the plaintiff class of each new waiting list created at a covered DHCR project. Thereafter, the Starrett defendants will provide such notice only to those members of the plaintiff class who have not been reached on the Starrett City waiting list at the time such notice is given: *Provided*, however, that if implementation of open access programs has not begun at at least five additional covered DHCR projects during the year following the beginning of the implementation of the first such program, the Starrett defendants' obligation to notify the full plaintiff class of each new waiting list created at a covered DHCR project will be extended for one additional year. Notwithstanding anything else in this paragraph, the Starrett defendants will not be obliged at any time to provide notice: (i) to any person who has already moved into an apartment at Starrett City at the time applications are to be distributed for the creation of a new waiting list at a covered DHCR project; or (ii) to any person whose previous mail from Starrett City has been returned undelivered due to an unknown addressee.

50. The Commissioner will require that voluntary or ordered open access programs created pursuant to the new regulation

give a priority, among minorities who apply for such opportunities created thereunder, to members of plaintiff class who apply for and are otherwise eligible for such newly created housing opportunities consistent with the following ranking, subject, however, to any existing priorities or preferences required by state or federal statutes or regulations:

First priority: minorities on the waiting list in existence at a particular covered DHCR project at the time the open access program is implemented at that project.

Second priority: members of plaintiff class on the Starrett City waiting list who have not become tenants at Starrett City or a covered DHCR project at the time the open access program is implemented and minorities on waiting lists in existence at all other covered DHCR projects as of the date of the Decree and still on such waiting lists at the time the open access program is implemented.

Third priority: all other minorities.

51. In implementing the regulation described in paragraphs 42 and 43, the Commissioner may submit documentation to, consult with, or request the advice and assistance of the New York State Division of Human Rights; but the Commissioner is not thereby relieved from responsibility for substantial compliance with this Part C.

52. In devising and implementing details of the program steps previously set out, the Commissioner may consider DHCR budget limitations.

53. The Commissioner will take such further steps as she, in her discretion, deems necessary and appropriate to further and enforce the regulation and voluntary programs and orders issued thereunder, which may include promulgation, issuance, revision or amendment of regulations and orders, and recommendation for legal action.

54. If the new regulation or this Decree is judicially challenged, the Commissioner will undertake in good faith to defend their validity.

Reporting

55. For a period of five years from the effective date of the Decree, the Commissioner will provide to plaintiffs' counsel:

(a) a copy of the proposed regulation described in paragraphs 42 and 43 above, at the time transmitted to the New York State Register for publication; and

(b) a list of covered DHCR projects identified pursuant to subparagraph 42(c) above, within 10 days of compilation of said list; and

(c) copies of all voluntary programs approved by the Commissioner pursuant to subparagraph 42(c) above, within 10 days of their approval; and

(d) notification of the initiation of review of covered DHCR projects pursuant to subparagraph 42(d) above, within 10 days of the initiation of such review; and

(e) copies of preliminary findings made pursuant to subparagraph 42(f) above, at the time of issuance; and

(f) copies of voluntary programs approved by the Commissioner pursuant to subparagraph 42(g) above within 10 days of approval; and

(g) copies of notices, if any, to covered DHCR projects setting forth their opportunity for rebuttal pursuant to subparagraph 42(g) above, at the time of issuance; and

(h) copies of formal findings and orders pursuant to subparagraph 42(h) above, at the time of issuance; and

(i) copies of all other orders, mandates and regulations issued by the Commissioner pursuant to this Part, at the time of issuance.

56. The Commissioner will continue the reporting provided for in paragraph 55 for two additional years upon written request therefore in the final year covered by paragraph 55.

57. For a period of 5 years after the date of this Decree, the Commissioner will provide to plaintiffs' counsel every six months a report for each covered DHCR project of the number of units rented, or, in the case of cooperatives, sold to minorities and to non-minorities pursuant to approved voluntary programs and the Commissioner's orders issued pursuant to paragraphs 42 and 43 above. The Commissioner will provide such reports on an annual basis for an additional period of 10 years; provided that no reports on a particular covered DHCR project need be made after the year in which such project achieves its initial project goal.

58. If a finding of no probable cause has been made under subparagraph 42(f) or a finding of no impermissible exclusion of or discrimination against minorities has been made under subparagraph 42(h), plaintiffs' counsel, upon reasonable notice, shall be given access to those parts of the investigatory file that explain the bases for the Commissioner's finding, subject to attorney-client privileges and to confidentiality restrictions regarding the disclosure by plaintiffs' counsel of the names or other personal information of applicants to and tenants in the covered DHCR project; and the Commissioner shall provide a brief description of documents from the investigatory file to which access is not provided.

Compliance

59. The Commissioner will seek to comply with Part C in good faith. However, the parties recognize that the Commissioner's effectiveness in the context of the complex duties imposed by state and federal law upon the Commissioner requires that the Commissioner have significant discretion. In the event, therefore, that the Commissioner fails to act in a manner plaintiffs believe to be consistent with this Decree, or acts in a manner they believe to be inconsistent with this Decree, said action or inaction will not be found to violate the requirement of good faith compliance:

(a) if the Commissioner demonstrates:

(i) substantial compliance with this Decree, or

(ii) that the act or failure to act was required by law, court order, federal regulation or federal administrative order, or

(iii) that the act or failure to act was the result of reasonable mistake or estimation, or of error or delay, occasioned by (A) judicial proceedings to enforce or defend DHCR orders or regulations or rights or obligations under this Decree or (B) by the acts of others not subject to DHCR control; and

(b) unless plaintiffs (i) have provided to the Commissioner, with a copy to the Attorney General, within four months of the discovery of the complained-of conduct, written notice of intention to proceed to enforce this order, with full and open specification of all relevant facts known to plaintiffs; and (ii) have sought resolution as provided in Part D of this Decree.

Existing DHCR Regulations

60. The existing regulations of the DHCR on Affirmative Fair Marketing, non-discrimination, and tenant selection continue to apply to all covered DHCR projects, subject to any requirements of this Decree or regulations and orders promulgated pursuant to the Decree or consistently with the objectives of the Decree, and the DHCR shall continue to collect or update such information from covered DHCR projects as the Commissioner, in her discretion, may determine to be necessary or appropriate.

PART D

61. Defendants will act in good faith to comply with the provisions of this Decree. If any party believes that another has violated its terms, the complaining party will notify the alleged defaulting party or parties within four months of the discovery of the alleged violation, in writing, specifying the alleged noncompliance. The parties concerned or their designees will meet

or make a reasonable effort to meet within 30 days of receipt of the letter of non-compliance and discuss the alleged non-compliance in good faith, in an effort to resolve the matter informally.

62. The complaining party may not bring any administrative or judicial proceeding to obtain compliance with the Decree unless: (A) the complaining party has complied with its obligations under paragraph 61; (B) 60 days have elapsed from the receipt of the letter of non-compliance; and (C) the complaint has not been resolved. If the grounds for any complaint have been eliminated or corrected before the filing of an administrative or judicial proceeding, no party may be found to have been out of compliance with this Decree.

PART E—Implementation

63. The plaintiff class withdraws with prejudice any and all claims actually raised in this action, and individual plaintiffs withdraw with prejudice any and all claims raised in this action or arising from or relating to any of the matters alleged or referred to in the Complaint, except for costs and attorneys' fees as set forth in Part F.

64. The parties will submit this Stipulation to the Court by joint motion for its approval as an order.

65. The parties will submit to this Court with this Stipulation a proposed notice to members of plaintiff class that the settlement has been submitted to the Court for its approval.

66. The parties will cooperate on the joint public announcement of the settlement.

67. Any party receiving formal notice of the filing of any lawsuit or administrative proceeding challenging any or all provisions of this Decree will advise all the other parties or their attorneys thereof within 10 days of receipt of the notice.

PART F—Attorneys' Fees and Costs

68. Within 90 days of the date of this Decree, counsel for plaintiffs will prepare and submit to the defendants an account-

ing of their costs and reasonable attorneys' fees. If within 60 days after the presentation of such accounting the parties are unable to agree on an award of attorneys' fees and costs, plaintiffs may apply to the Court for such award.

Dated: Brooklyn, New York
March 31, 1985

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By:

/s/ MORRIS B. ABRAM

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Attorneys for Plaintiffs
By:

/s/ JAMES I. MEYERSON

Dated: Brooklyn, New York
April 2, 1985

SO ORDERED:

/s/ EDWARD R. NEAHER, D.J.
Edward R. Neaher, D.J.

FILED: April 2, 1985

EXHIBIT A

Ethnic Breakdown of Occupied Buildings
in Starrett City, Month Ending _____

Bldg	Total Units	W	B	H	OR	OT	M	AI	Total	% Ethnic	% Occ
A1	156										
	Percentage										
A2	156										
	%										
A3	156										
	%										
A4	156										
	%										
A5	156										
	%										
B1	132										
	%										
B2	156										
	%										
B3	130										
	%										
C1	156										
	%										
C2	156										
	%										
C3	152										
	%										
C4	132										
	%										

Ethnic Breakdown of Occupied Buildings in Starrett City, Month Ending _____

Bldg	Total Units	W	B	H	OR	OT	M	AI	Total	% Ethnic	% Occ
C5	132										
	Percentage										
C6	152										
	%										
C7	156										
	%										
C8	132										
	%										
D1	156										
	%										
D2	156										
	%										
D3	130										
	%										
D4	84										
	%										
D5	132										
	%										
D6	152										
	%										
E1	152										
	%										
E2	132										
	%										

Ethnic Breakdown of Occupied Buildings in Starrett City, Month Ending _____

Bldg	Total Units	W	B	H	OR	OT	M	AI	Total	% Ethnic	% Occ
E3	84										
	Percentage										
F1	132										
	%										
F2	132										
	%										
F3	84										
	%										
F4	132										
	%										
G1	132										
	%										
G2	132										
	%										
G3	131										
	%										
G4	131										
	%										
G5	131										
	%										
G6	84										
	%										
G7	84										
	%										

Ethnic Breakdown of Occupied Buildings in Starrett City, Month Ending _____

Bldg	Total Units	W	B	H	OR	OT	M	AI	Total	% Ethnic	% Occ
G8	84										
	Percentage										
G9	132										
	%										
G10	132										
	%										
H1	84										
	%										
H2	84										
	%										
H3	132										
	%										
H4	132										
	%										
H5	84										
	%										
H6	84										
	%										
H7	84										
	%										
Total	5881										
	%										
	%										

APPENDIX J

Statutes Involved

Title 42, Sections 3601-3631 of the United States Code
("The Fair Housing Act") (Selected Provisions)

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§ 3602. Definitions

As used in this subchapter—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, or 3606 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

§ 3605. Discrimination in financing of housing

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discrimi-

nate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided*, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

§ 3606. Discrimination in provision of brokerage services

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin.

§ 3608. Administration

(a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(b) The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105,

3344, 5362, and 7521 of Title 5. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(2) publish and disseminate reports, recommendations, and information derived from such studies;

(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

§ 3610. Enforcement

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging

in such practice or order such affirmative action as may be appropriate.

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

§ 3612. Enforcement by private persons

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought purusant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or

subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

§ 3613. Enforcement by Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

Title 42, Section 2000e-2 of the
United States Code

§ 2000e-2. Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or na-

tional origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for

any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is

given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

84 Civ. 2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC. and DELMAR MANAGEMENT CO.,

Defendants.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT C. ROSENBERG, being duly sworn, states:

Introduction

1. I am Senior Vice President of Starrett City, Inc., and General Manager of Delmar Management Co. Starrett City, Inc., is a general partner of Starrett City Associates, which owns the Starrett City housing development in Brooklyn, New York. Delmar Management Co. is the managing agent for Starrett City. I have managed the Starrett City housing development since July of 1973.

2. Starrett City is the largest federally assisted housing development in the United States. It consists of 46 high-rise residential apartment buildings containing 5,881 apartments on a 153-acre site. Starrett City currently houses a highly diverse population of about 17,000 persons, of whom, according to the

1980 census, approximately 55% are white and approximately 45% are non-white or Hispanic.[1] Starrett City also contains a shopping center with 20 stores, a pre-school center, a public elementary school, a public intermediate school, a recreational and community center, a medical and dental center, eight multiple-level parking garages, and its own electrical generating plant. (A site plan for Starrett City is annexed hereto as Exhibit A and an aerial photograph of Starrett City is annexed as Exhibit B.) Starrett City effectively functions as an independent community.

3. Starrett City is viewed by its residents, by its management, and by urban experts nationwide as a highly successful housing development. Starrett City's establishment of a racially integrated and economically stable community in very difficult surroundings is particularly remarkable. As I discuss in detail in this affidavit, Starrett City's success is attributable in large part to years of effort and the expenditure of millions of dollars, which ensured that the development would become and remain an integrated community.

4. The success of Starrett City as a racially integrated community has contributed to—indeed, has served as a catalyst for—the revitalization of the neighboring East New York area. Today, as one drives through the area directly north of Starrett City, one can see numerous examples of new businesses and new or renovated housing replacing abandoned or boarded-up stores and houses. The success and stability of Starrett City have played a significant role in encouraging this redevelopment and arresting the deterioration of East New York.

5. Among the numerous programs Starrett City adopted to promote racial integration was the carefully planned use of race-conscious tenant selection methods. No applicant has ever been denied an apartment at Starrett City on account of race, although many qualified minority applicants for apartments

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1 For a more detailed discussion of the racial composition of Starrett City, *see infra* ¶¶ 84-85.

have had to wait longer for an apartment than similar non-minority applicants.

6. Starrett City's tenant selection methods were crafted only after careful and lengthy consideration by me and by other Starrett City representatives and government officials with extensive experience in the problems that accompany efforts to create integrated housing. From the very beginning of the process, Starrett City acted as the agent of the state and federal governments, which were and are the sponsors and principal financial supporters of the development. Those governments approved, funded, and supervised Starrett City's efforts to create an integrated development.

7. From the outset, there was no question that both the federal and state governments wanted Starrett City to become and remain an integrated project. Officials of the New York State Division of Housing and Community Renewal ("DHCR") and the United States Department of Housing and Urban Development ("HUD") discussed the subject of integration with Starrett City's representatives and left no doubt that they wanted Starrett City to do what was necessary to rent the development on an integrated basis. Representatives of DHCR and HUD visited the development on numerous occasions during the rent-up period, and they were fully informed of the measures being employed by Starrett City to achieve an integrated tenant population. Starrett never would have undertaken its tenant selection practices had it not been for the active support and encouragement of the state and federal governments. It is impossible to stress that point too strongly.

8. We recognized from the beginning that we were engaged in an experiment to see whether integrated housing could exist and flourish and endure in an inner-city urban setting. We undertook that experiment at the urging and with the blessing of both DHCR and HUD, and we implemented our tenant selection practices with the knowledge and concurrence of both government agencies.

9. Starrett City's race-conscious tenant selection methods were and are intended solely to promote racial integration. The

measures are necessary because, from the beginning of rent-up to the present, most applicants on the waiting lists for all categories of apartments at Starrett City have been black. If Starrett City were to rent apartments on a completely first-come, first-served basis, the development would rapidly become predominantly minority.

10. White tenants, and to a substantial extent middle-class minority tenants as well, have historically been reluctant to remain in, or even to move into, predominantly minority housing developments. Developments that have become predominantly minority have repeatedly experienced substantial increases in the move-out rates of whites and substantial declines in new applications from whites and in the rate of actual move-ins by existing white applicants. As a result, predominantly minority developments have frequently been transformed quickly into *de facto* segregated, all-minority developments.

11. Housing experts have used the term "tipping" to refer to this transformation from a stably integrated community to a predominantly minority community and then to an almost completely minority community. If Starrett City were to be required to rent its apartments on a first-come, first-served basis, the development would, in my judgment, undoubtedly "tip," and become, irreversibly, a virtually all-minority community.

12. It should be stressed at the outset that this lawsuit does not involve merely an attack on the policies implemented by Starrett City's management acting in conjunction with state and federal policymakers. It involves an attack on the entire Starrett City community. The persons who have the most at stake in this lawsuit are not the management of Starrett City or the employees in Starrett City's rental office or the persons who have invested money in the development. Rather, the persons who will be most affected by the outcome of this case will be the thousands of people who live in Starrett City's apartments.

13. The persons who have decided to make their homes at Starrett City, both white and minority, have done so in large part because of Starrett City's known commitment to achieving and maintaining an integrated environment. The thousands of

residents of Starrett City, as much or more than Starrett City's management, have made that commitment a reality. It is the residents of Starrett City who have created a community that is a model of successful integrated living. Deplorably, the government's lawsuit seeks to destroy that model, solely to satisfy an ideological obsession with eliminating any affirmative action program that involves any differential treatment based on race.

14. By moving into apartments at Starrett City, thousands of persons have made both a personal and financial investment in the development. They have left their previous living accommodations in response to the promise of a better place to live at Starrett City. They have taken that important step largely in reliance on the well-publicized commitment, not only by Starrett City's management but also by the state and federal governments, to create and preserve an integrated environment at Starrett City. They acted not out of blind faith in Starrett City's management but on the basis of the well-founded understanding that the state and federal governments had given their approval to the measures needed to maintain Starrett City's stably integrated character.

15. In Starrett City's view, therefore, the government's lawsuit is nothing less than an attempt to destroy the painstakingly created racial integration and harmony that now prevail at Starrett City, and to turn Starrett City into a racially segregated housing development. What the United States really attacks in this lawsuit is Starrett City's vigorous commitment, pursued at great effort and expense, to the policy of racial integration that is at the heart of the Fair Housing Act.

Personal Background

16. I attended New York University from 1952 until 1955, when I received a Bachelor of Science degree. I graduated from Columbia Law School with a LL.B. in 1958.

17. Before 1968, I was engaged in the private practice of law, concentrating particularly in the fields of real estate and housing. I represented various housing companies, and spent a con-

siderable portion of my time on rent control matters and site clearance work for new construction.

18. From 1968 to 1972 I served as Assistant Administrator for Special Programs at the New York City Housing and Development Administration ("NYCHDA"). From 1972 to 1973, I was First Deputy Commissioner for Housing Production at NYCHDA. In those capacities I supervised all new housing projects covered by the Mitchell-Lama program in New York City.[2] I was also heavily involved with urban renewal programs. I personally oversaw the planning of at least 26 Mitchell-Lama projects, involving at least 25,000 apartments.

19. During my work at NYCHDA, I learned much about the practical realities of trying to achieve racially integrated housing in an imperfect world. I worked closely with the Equal Opportunity Officer at NYCHDA; I sought to ensure that the work forces on City projects were racially integrated; and I provided City funds for marketing efforts to integrate the tenant population at NYCHDA projects. I saw first-hand the effectiveness of NYCHDA's efforts to promote racial integration by holding apartments off the market and by using race-conscious tenant selection methods—both of which techniques were later used at Starrett City for the same purpose.

20. As a result of my experience in the public and private sectors of the housing industry, I came to believe that race-conscious tenant selection methods are an essential part of any program to achieve racial integration in virtually any government-subsidized housing development within New York City. Racial integration is especially difficult to achieve for projects built in economically deteriorating neighborhoods, neighborhoods with serious crime and security problems, or predominantly minority neighborhoods—all characteristics of East New York, the Brooklyn community immediately adjacent to Starrett City on the north.

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2 The New York State Mitchell-Lama Act, also known as the Limited-Profit Housing Companies Law, created a complicated array of tax subsidies and direct state and municipal assistance to encourage the construction of housing projects for low and moderate income residents. *See* N.Y. Priv. Hous. Fin. Law §§ 10-37 (McKinney 1976 & Supp. 1986).

The Origins of Starrett City

21. Starrett City was constructed at the site originally planned for a 6,000-unit development of cooperative apartments that was to have been named Twin Pines Village. In 1967, the United Housing Foundation ("UHF") agreed with the Housing commissioner of the State of New York to undertake the Twin Pines Village project, and construction began in 1970. The New York State Housing Finance Agency ("HFA") extended a $124,000,000 loan to UHF for the project, and HUD reduced UHF's payments on that loan by agreeing to pay interest subsidies under § 236 of the National Housing Act. Despite this assistance, in 1971 rising construction costs and a dispute with the State over housing plans led UHF to abandon the project.

22. Charles Urstadt, the Commissioner of Housing and Community Renewal for the State of New York, and Robert Olnick of Starrett Housing Corporation then agreed that Starrett Housing Corporation would take over the development. Because Starrett Housing Corporation's experience and expertise were in the rental housing market, Commissioner Urstadt and Mr. Olnick also agreed that Starrett Housing Corporation would operate the project as rental housing rather than cooperative apartments.

23. The change from cooperative to rental status required approval of the New York City Board of Estimate because the real estate tax abatement granted to Twin Pines Village under the Mitchell-Lama program had to be transferred to Starrett City. However, substantial opposition to the transfer developed from various community and political figures, including Sam Leone, then the Brooklyn Borough President. In addition, Frank Brasco, a member of Congress from Brooklyn, threatened to oppose transfer of the federal contract for the payment of interest subsidies. Opposition to the project centered on the fear that, in light of the neighborhood surrounding the project and past experiences with subsidized housing, the conversion to rental apartments would result in Starrett City's becoming an overwhelmingly minority development. That, in the opponents'

view, would have threatened the stability of the development and would have created a risk that the development would deteriorate rapidly, with possible adverse effects on Canarsie and other nearby communities, which already faced strong demographic pressures.

24. In response to these objections, Starrett City's developer, with the support of state and city officials, assured community and political leaders that it intended to create a racially integrated community. After being given those assurances, the Board of Estimate, over the opposition of the Brooklyn Borough President, approved transfer of the real estate tax abatement to Starrett City on March 9, 1972. A copy of the minutes of the Board of Estimate meeting noting the approval of the transfer is annexed hereto as Exhibit C.

Federal and State Assistance to Starrett City

25. Initially, the construction of Starrett City was financed by (a) a 40-year mortgage in the amount of $307,720,000 provided by HFA in July 1972 and (b) a capital contribution from Starrett City Associates in the amount of $16,780,000. On December 30, 1975, HFA increased its mortgage loan by $36,000,000 to $343,720,000, and Starrett City Associates added $1,311,000 to its capital contribution. On April 19, 1979, HFA increased its mortgage loan by $19,000,000 to $362,720,000 and Starrett City Associates increased its capital contribution by $1,000,000 to $19,091,000.

26. Starrett City receives financial assistance from the federal government both in the form of payments to HFA that reduce Starrett's debt service on the HFA mortgage and in the form of direct rental subsidies for persons living at Starrett City. A brief description of the various federal programs benefiting Starrett City follows.

The Section 236 Contract With HUD

27. Pursuant to a contract under Section 236 of the National Housing Act of 1934, as amended, 12 U.S.C. § 1715z-1, HUD

makes monthly payments to HFA in an amount equal to the difference between the monthly installment that Starrett City, Inc., is obligated to pay under its mortgage with HFA (which bears an interest rate of 8-1/2%) and the monthly installment that Starrett City, Inc. would be obligated to pay if the interest rate on the mortgage were 1%. The HUD payments thus reduce Starrett City's debt service payments to a level calculated on the basis of a 1% interest rate.

28. HUD's payments under the Section 236 contract were initially limited to $11,000,000 per year for a period not to exceed 50 years. On December 24, 1975, the contract was amended to provide for an increase in annual payments from $11,000,000 to $19,910,325, to compensate for the increase in the mortgage HFA held from Starrett City, Inc.

29. HUD's payments under the Section 236 contract began in April 1975. At that time, only a small percentage of the apartments at Starrett City were rented. Ordinarily HUD required that a development be fully occupied before Section 236 payments could begin. HUD waived this requirement in the case of Starrett City, because it recognized that Starrett City's efforts to achieve an integrated tenant population would substantially prolong both the construction and rent-up process.

30. From April 1975 through March 1986, HUD paid HFA $211,275,605 in reduction of Starrett City's debt service obligation.

31. In exchange for HUD's payments under the Section 236 contract, Starrett City agreed to charge eligible tenants either a specific monthly rental approved by HUD (so-called "Section 236 rent"), or 25% of the tenant's adjusted monthly income, whichever was greater, in lieu of market rent.[3]

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3 As a result of HUD regulations put into effect in 1981, Starrett City now charges tenants either the Section 236 rent or 30% of the tenant's adjusted monthly income, whichever is greater.

HUD's Rental Assistance Program

32. On February 18, 1976, Starrett City, Inc. entered into a Rental Assistance Program ("RAP") contract with HUD. Under the RAP contract, HUD agreed to pay Starrett City direct rental subsidies for 1,176 one-bedroom apartments. Starrett City used these subsidies for apartments housing senior citizens.

33. Under the RAP contract, the monthly rent a tenant must pay is calculated as a percentage of the tenant's adjusted monthly income. A tenant is eligible for RAP assistance if the stated percentage of his adjusted monthly income is less than the applicable Section 236 rent. HUD pays Starrett City the difference between the Section 236 rent and the stated percentage of the tenant's adjusted monthly income.

34. Since 1976, both the funding for, and the number of apartments covered by, the RAP program have increased. The initial annual funding limit under the RAP contract was $2,234,536. On September 27, 1978, the RAP contract was amended to increase the annual funding limit to $2,724,005. On July 27, 1979, the RAP contract was amended to make subsidies available for 210 larger apartments, making a total of 1,386 RAP-subsidized apartments. At the same time, the annual funding limit was increased to $3,139,804. Since July 27, 1979, Starrett City has used RAP subsidies to assist families in two-bedroom and three-bedroom apartments, as well as senior citizens in one-bedroom apartments. On August 6, 1980, the RAP contract was amended to increase the annual funding limit to $3,530,974.

35. In conjunction with a substantial increase in the Section 236 rent in January 1981, the RAP contract was amended again, on January 19, 1981, to make RAP subsidies available to an additional 1,152 apartments, for a total of 2,538 RAP-subsidized apartments at Starrett City. At the same time, the annual funding limit for RAP apartments was increased to $9,389,543.

HUD's Section 8 Program

36. On January 19, 1981, Starrett City, Inc., HFA, and HUD also entered into agreements under Section 8 of the United States Housing Act of 1937, as added by the Housing and Community Development Act of 1974, and subsequently amended, 42 U.S.C. § 1437f. These agreements provided for additional direct federal rental subsidies to Starrett City.

37. Under the Section 8 program, as under the RAP contract, HUD pays Starrett City an amount equal to the difference between the Section 236 rent and a stated percentage of the tenant family's adjusted monthly income. HFA has been designated as the "Public Housing Agency" that administers the Section 8 program at Starrett City in accordance with HUD's regulations (24 C.F.R. §§ 882.101 *et seq.*).

38. The Section 8 agreements authorize subsidies for 3,343 apartments at Starrett City. Thus, since January 1981, when the additional RAP subsidies and the Section 8 subsidies became available, all 5,881 apartments at Starrett City have been eligible for direct federal rental subsidies.

39. Under the Section 8 agreements, which run for 15 years, Starrett City must rent at least 30% of the Section 8 units (*i.e.*, at least 1,000 units) to Very Low Income Families—families whose income does not exceed 80% of the median income for the area. This contractual obligation is required by the governing statute and regulations.[4] 42 U.S.C. § 1437f(c)(7) (1976); 24 C.F.R. § 882.113 (1980).

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4 The maximum income limits for families applying for Section 8 benefits at Starrett City are as follows:

Number of Persons	Low Income	Very Low Income
1	$15,250	$10,000
2	17,400	11,400
3	19,550	12,800
4	21,750	14,250
5	23,100	15,400
6	24,450	16,550

These limits have not changed since January 1981.

40. Before the Housing and Community Development Amendments of 1981, rents for Section 236, RAP, and Section 8 tenants at Starrett City were normally set at 25% of adjusted monthly income. There were slight differences in the way in which RAP and Section 8 rents were calculated, which primarily affected elderly tenants. The 1981 Amendments eliminated the difference between RAP and Section 8 rents and provided that rents for new RAP and Section 8 tenants would thereafter be set at 30% of adjusted monthly income and that rents for existing RAP and Section 8 tenants would gradually increase, over a five year period, to 30% of adjusted monthly income. 12 U.S.C. § 1715z-1(f) (1982); 42 U.S.C. § 1437a(a) (1982 & Supp. II 1984).

41. The current annual funding limit for Section 8 subsidies at Starrett City is $12.5 million.

Starrett City's HUD-Approved Marketing Plan

42. As a consequence of its extensive HUD funding, Starrett City's marketing efforts were and are governed by HUD regulations. In particular, Starrett City was required to develop an Affirmative Fair Housing Marketing Plan and to submit that plan to HUD for its approval (24 C.F.R. §§ 200.500 *et seq.*).

43. Starrett City's Affirmative Marketing Plan was approved by HUD's Equal Opportunity Division on June 18, 1975, and has been in effect since that date. Under the heading "Anticipated Results," the Marketing Plan states:

> We anticipate and will encourage a good economic, social and racial mix at Starrett City. Because the development is located near and easily accessible to East New York, a predominantly low-moderate income black neighborhood, and is physically separated by an unbridged waterway (Fresh Creek) from the adjacent predominantly white community of Canarsie, we anticipate that considerable outreach will be necessary to attract eligible majority and non-black minority families and individuals.

* * *

> Reflecting the social and ethnic composition of surrounding neighborhoods, we would hope to achieve a social mix of 70% majority and 30% minority occupants.

A copy of the Starrett City Affirmative Marketing Plan is annexed hereto as Exhibit D.

Construction of Starrett City

44. Construction of Starrett City began in 1970 with initial work on the electrical generating plant; construction of the residential buildings began in 1972. In July of 1973, I was hired by Robert Olnick, then the Chairman of Starrett Housing Corporation, to supervise both the operation of the development and the marketing of the development to prospective tenants.

45. From the outset, all parties were committed to constructing a mixed-income, racially integrated development. Initial plans called for 70% of the units to be rented to white tenants, and 30% of the units to be rented to minority tenants. This figure was intended to accommodate the largest possible number of minority tenants without jeopardizing the development's ability to attract and retain white and middle-class minority tenants. We in fact believed that a 30% minority population by unit created some risk that majority tenants would not move in or would leave, but—in the interests of creating a genuinely and fully integrated development—we sought to rent as many units as realistically possible to minority members.

46. Numerous federal, state, and local officials were aware of, and approved of, the 70%/30% target proportion. For example, both Lee Goodwin, then New York State Commissioner of Housing and Community Renewal, and Joseph Monticello, the local area director for the United States Department of Housing and Urban Development, knew of and endorsed our plans for achieving a 70%/30% racial balance.

47. Starrett City management and New York State officials discovered early in the construction of the project that attracting significant numbers of non-minority tenants would be very

difficult. Starrett City borders on East New York, a predominantly minority, high-crime area. To the south was a large garbage dump that emitted foul odors. To the east was a water pollution control plant. To the west was an unbridged creek that divided the development from the middle-class neighborhood of Canarsie, and thus emphasized its proximity to East New York. Starrett City is in the flight path of aircraft taking off and landing at Kennedy Airport. Finally, Starrett City lacked readily accessible public transportation facilities.

48. Certain other factors also limited the group of persons who were likely to be interested in becoming tenants at Starrett City; this made it even more difficult to achieve an integrated community. Many middle-class families were looking for homes only in the suburbs, a fact that made rental of urban projects problematical. In addition, the maximum income limitations imposed by the federal government as a condition of its financial assistance to the project restricted the group of eligible tenants. The State also regulated the number of persons who could occupy apartments.

49. The concern that racial integration would be a difficult goal to attain was confirmed in 1972, when an information center for prospective tenants was set up in a trailer at the northern end of Starrett City. About 50 prospective tenants a day called at the trailer, or several thousand during the course of 1972. Ninety-nine percent of those people came from the adjacent area of East New York and were black.

50. Starrett City then changed its construction plans. Initially, Starrett City intended to construct the residential buildings at the northern end of the development first, and work southward. This plan made logistical sense, since existing hookups to municipal utilities were all located at the northern end of the development. However Starrett City's northern edge bordered on the predominantly minority, high-crime neighborhood of East New York and the developer realized that identification of the development with this neighborhood would make it impossible to attract a racially integrated tenant population.

51. For these reasons Starrett City changed the construction sequence. Under the first changed plan, Starrett City began to build at the southern end of the project, while concurrently working on the buildings at the northern end on which construction had already commenced. The southern buildings bordered on Jamaica Bay, a location that Starrett City management believed would be more attractive to tenants of all races. After I was hired as Starrett City manager, I stopped construction at the northern end entirely, sealed off those buildings against the weather and proceeded with construction on the southern buildings only, in an effort to complete and rent these buildings first and thus to establish an integrated base from which we could move north.

52. The decision to change the building sequence in this way involved more than $1 million in additional construction costs. We had to build trenches and bridges through the entire site to the southern buildings, and to run utility lines to the buildings furthest from the available utility hookups. These steps made no sense from an engineering point of view, and were undertaken solely to further our goal of racial integration.

53. Lee Goodwin, then the New York State Commissioner of Housing and Community Renewal, was fully informed of the reasons for our change in construction sequence. She encouraged and formally approved of the decision. Starrett City was also obliged to seek an increase in its mortgage, to pay, among other expenses, the increased costs of construction and the unexpectedly high marketing costs associated with seeking a racially balanced group of tenants. In response to our application, Commissioner Goodwin assured us that "we will approve your request for an increase in the amount of the mortgage to cover acceptable over-runs in operating expenses which we determine to be reasonably necessary to accomplish a fully integrated community." (Letter from Lee Goodwin to Robert S. Olnick, dated Feb. 20, 1975, copy annexed hereto as Exhibit E.) Ultimately the State approved the entire increase we sought and HUD approved a corresponding increase in its Section 236 payments to HFA.

54. Starrett City also redesigned many of its facilities with a view to attracting a mix of tenants of varying economic status, race, age, and family size. The Starrett City shopping mall, medical center, and recreation center, for example, were conceived at this time. The plans for apartments were upgraded to include such amenities as dishwashers, and model apartments were opened to display these advantages to prospective tenants. Starrett City also provided shuttle bus transportation to the Canarsie subway station for its initial tenants, so that they would not have to use the dangerous bus and subway stations in East New York, which was and remains a high-crime area.

55. Starrett City also developed plans for two on-site schools that currently operate there. Before the permanent elementary school was built, Starrett City leased space for a temporary school so that children from Starrett City would not have to attend the existing, largely segregated public schools in East New York.

56. Starrett City also created a sixty-five member private police force. These professionally trained, highly paid, highly motivated special patrol officers successfully gave Starrett City a reputation as a safe place to live.

57. Starrett City also inaugurated and has maintained extremely expensive maintenance programs to keep the grounds and buildings clean. These programs were intended to discourage the fears of physical deterioration and lack of security that might otherwise have prevented occupancy of the development by a racially mixed population.

Starrett City's Rental Office and Initial Advertising Efforts

58. Starrett City first opened a rental office in December of 1973. The project had previously had an information office where prospective tenants could record their interest in obtaining an apartment at Starrett City, but application forms only became available with the opening of the rental office.

59. When the rental office opened, construction was only about two-thirds complete. The shopping mall had not been

finished, and much of the road-paving and landscaping work remained to be done. This situation increased the difficulty of marketing the project.

60. The rental office, like the previous information office, attracted numerous blacks who lived in neighboring areas, but very few whites and very few non-black minorities, such as Hispanics and Asians, applied.

61. Starrett City then undertook an unprecedented advertising and outreach campaign designed to attract a broad mix of potential tenants, both white and minority. Initially, the campaign focused on newspaper advertisements, including full-page advertisements in the *New York Times*. After the first tenants moved into Starrett City in November of 1974, we also ran advertisements that included testimonials from Starrett City residents, emphasizing the safe, integrated character of the project. A sampling of the newspaper advertisements we ran is annexed hereto as Exhibit F.

62. We also used numerous other advertising and publicity methods to encourage a diverse group of applicants for apartments. These included on-site public relations work, bus and subway posters, mobile vans, door-to-door distribution of the *Starrett City Sun*, and presentations by Starrett City management to church and civic groups.

63. While these efforts produced some results, by the spring of 1976 only half the Starrett City units were rented, although far more than half had been constructed. Starrett City held apartments off the market rather than renting them immediately, in the hope that the advertising campaign would lead to a more racially diverse group of applicants, and thus to a more fully integrated community.

64. Starrett City's next advertising campaign focused on direct mail solicitations. Simultaneously, Starrett City began an intensive market research campaign to target prospective tenants.

65. In part as a result of the market research findings, in 1978 Starrett City launched a major television advertising cam-

paign. As far as I know, this was the first time that television advertising was used for the purpose of renting apartments in a governmentally subsidized housing development. The television advertising was highly successful in attracting racially diverse applicants. By the end of 1979 Starrett City was 94% occupied, and by the end of 1980 it was 97% occupied.

66. The long delay in achieving full rental, and the enormous financial burden caused by that delay, followed directly from our commitment to racial integration. Approximately $21 million in rental income alone was lost, disregarding advertising and all other costs. Had Starrett City's developer and the sponsoring federal and state agencies been willing to operate a segregated, nearly all-black project, apartments could have been rented virtually as soon as the buildings were constructed. However, Starrett City held apartments off the market while it sought a diversity of qualified white and minority applicants to ensure that it could translate the abstract goal of racial integration into a practical reality.

67. To offset the substantial additional costs it incurred, Starrett City requested and obtained a second mortgage increase, which both New York State and HUD approved. In April of 1979, the State increased the mortgage by $19 million and Starrett City investors increased their capital contributions by $1 million.

68. Both HUD and DHCR were fully informed that the mortgage increase was necessary because Starrett City had lost potential rental income because it held apartments off the market while it attempted to attract an integrated group of tenants.

69. Delmar Management Co. ("Delmar") was and is the rental agent for Starrett City. The original rental agency agreement between Delmar and Starrett City, Inc., dated December 11, 1973, was approved by DHCR on December 5, 1974. A copy of that agreement is annexed hereto as Exhibit G. Paragraph 9(h) of the agreement provides that:

> [Starrett City, Inc. and Delmar Management Company] will take affirmative action to insure open occupancy and racial integration in the operation of the project.

Paragraph 9(h) also refers to advertising, interest payment subsidies, and other forms of financial assistance that "may be used to encourage integrated occupancy of the project."

70. The rental agency agreement was modified numerous times to cover the additional expenditures of time and money that Delmar incurred in its successful effort to integrate Starrett City. Ultimately, the entire method of compensating Delmar was changed from DHCR's standard "straight fee" arrangement, under which Delmar was expected to pay marketing expenses out of its fee, to a cost reimbursement system, under which Delmar was reimbursed for all reasonably incurred marketing and other expenses, plus a further allowance for Delmar's overhead and fee. These modifications were required primarily to offset the unexpectedly high costs of marketing efforts designed to achieve a racially integrated community. Although the initial rental agent agreement called for a fee of $588,000, in fact more than $5 million was ultimately spent on marketing.

71. Starrett City did not merely attempt to maintain racial integration in the project as a whole: it integrated every building, and indeed every floor. Starrett City also sought to prevent any particular apartments from becoming white-identified or minority-identified through a succession of tenants of similar racial background. To accomplish these goals, Starrett City kept records showing the racial makeup of each apartment and each floor. An example of such a record is annexed hereto as Exhibit H.

72. For one class of tenants—senior citizens—Starrett City had difficulty attracting black prospective tenants. Some buildings at Starrett City were designed principally for senior citizens, and in keeping with its general policy Starrett City wanted those buildings to be racially integrated. Starrett City therefore delayed rental of some apartments to white senior citizens while it attempted to find qualified black applicants. In this way,

Starrett City ensured that the senior citizen buildings, as well as the other buildings in the development, would be truly integrated.

Rental Procedures

73. The normal procedure for renting an apartment at Starrett City involves a number of steps. When a prospective tenant first applies for an apartment, he or she fills out a card with various personal information, including age, race, family size, income and similar data. We then check the income figures provided and tentatively determine whether the applicant qualifies under the income limitations imposed by the federal government. If the applicant appears to qualify, he or she is placed on the waiting list. Based on experience, Starrett City's rental office personnel can estimate how many apartments are likely to become vacant in a particular period of time. From time to time, in anticipation of such future vacancies, the rental office will contact a group of persons on the waiting list, informing them that their names have been reached and inviting them to begin full processing of their applications. For those who respond favorably. Starrett City arranges a credit check, and it also sends a representative to visit the applicant at home. If no problems surface during these steps, the applicant is offered an apartment when one becomes available. After a lease is signed, the applicant moves in. (Copies of the forms employed at various stages of this process are annexed hereto as Exhibit I.)

The Arthur Litigation

74. On December 5, 1979, several minority members on the waiting list for apartments at Starrett City brought a class action against Starrett City[5] and against the New York State Commissioner of Housing and Community Renewal. *Arthur, et al.* v. *Starrett City Associates, et al.*, 79 Civ. 3096 (E.D.N.Y.). The complaint alleged that Starrett City's tenant

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5 The named private defendants in *Arthur* were Starrett City Associates, Starrett City, Inc., and Delmar Management Company—precisely the same defendants sued by the government in this case.

selection methods discriminated on the basis of race in violation of federal and state law, and that the State of New York had encouraged and approved those tenant selection methods. On June 22, 1983, this Court certified the plaintiff class, which consisted of black applicants on the Starrett City waiting list.

75. After extensive discovery, and with the case on the verge of trial, the parties reached a settlement. On April 2, 1985, this Court approved a consent decree, Paragraph 17 of which summarized the elements of the settlement as follows:

> (a) plaintiffs will withdraw with prejudice any and all claims they have against defendants;
>
> (b) to the extent permitted by law, the Starrett defendants, in renting vacant apartments at Starrett City, will continue to use controlled tenant selection on the basis of race;
>
> (c) the Starrett defendants will increase the percentage of units rented to blacks and hispanics at Starrett City . . . ; and
>
> (d) the Commissioner and DHCR will establish an open access program to increase the availability of housing for the plaintiff class and other minorities . . . .

(A copy of the *Arthur* consent decree is annexed hereto as Exhibit J.)

76. The section of the consent decree describing the obligations of the Starrett City defendants opened with the following statement (Paragraph 31): "To the extent permitted by law, the Starrett defendants will continue to maintain racial integration through controlled tenant selection on the basis of race so long as they comply with and carry out their obligations under [other provisions of the consent decree]. All parties agree that the ultimate goal at Starrett City is maintenance of an integrated community without resort to controlled tenanting."

77. Under Paragraph 32 of the consent decree, the Starrett City defendants promised to increase, over a period not to exceed five years, the number of units occupied by blacks and

Hispanics by 175 units, out of a total of 5,881 units. Starrett City agreed to this gradual and moderate increase in minority tenancy because it concluded, after careful study, that such an increase would not create an unacceptably large risk of "tipping" the development. However, Starrett City then believed, and continues to believe, that once the obligations imposed by the consent decree have been fulfilled, the development will be at or near the maximum number of minority tenants consistent with stable racial integration in the Starrett City community.

78. In Paragraph 41 of the consent decree, DHCR promised to "undertake a program to achieve the goal of 20% minority occupancy, by units, in covered DHCR projects within 15 years." Starrett City, of course, has at all times had a minority population greatly in excess of this target figure. This fact was acknowledged in the "Findings of Fact" section of the consent decree (Paragraph 22), which described Starrett City as "a stable, well-maintained, well-managed development that for nearly ten years has served an integrated tenant population, at levels of minority participation that rank very high among integrated, DHCR-supervised projects in New York City. Starrett City has extensive services and amenities on site and constitutes a distinct neighborhood with its own sense of community."

79. DHCR was also ordered to provide by regulation that minority applicants on the Starrett City waiting list be given priority on waiting lists for other DHCR-supervised housing projects. That priority was designed in part to reduce the number of minority members waiting for an apartment at Starrett City, and thus to promote Starrett City's efforts to rent to a racially balanced group of tenants.

80. The consent decree was executed on behalf of the plaintiff class by, among others, counsel from the Open Housing Center, the Fair Housing Clinic at the Columbia University School of Law, and the N.A.A.C.P. The consent decree was also executed by the Attorney General of the State of New York on behalf of the Commissioner of Housing and Community Renewal, and by the Starrett City defendants.

81. All black applicants on the waiting list for apartments at Starrett City were informed of the terms of the settlement agreement, and were given 45 days to object to its terms. Not a single class member objected within that time, and to the best of my knowledge no class member has to this day objected to the settlement.

82. Starrett City has at all times observed its obligations under the consent decree. I know of no class member or other person who has ever complained that Starrett City has failed to obey the consent decree in any respect. Indeed, as the figures I report below show, Starrett City has proceeded even faster than required by the consent decree to fulfill its obligation to increase the number of apartments rented to black and Hispanic tenants.

Starrett City Today

83. Starrett City has succeeded thus far in maintaining a stable and racially integrated community of approximately 17,000 residents. In keeping with our commitment to accommodate as many minority tenants as possible without jeopardizing the integrated character of the community, Starrett City has rented apartments to significantly more minority tenants than the initial 30% minority/70% non-minority target would have dictated.

84. According to the 1980 census, Starrett City was by population approximately 55% white and 45% minority. Starrett City's racial composition by unit as of March 31, 1986 was approximately 63% white, 22% black, 8% Hispanic, 5% Oriental, and 2% other or mixed. A Starrett City business record showing the building-by-building tabulation of Starrett City's racial composition at the end of March 1986 is annexed hereto as Exhibit K. This document is one of the monthly reports that have been submitted to plaintiffs' counsel in *Arthur* in compliance with the consent decree in that case.

85. We do not have any racial breakdown of Starrett City's tenant population more recent than the 1980 census. We believe population figures revealed by the 1980 census remain approxi-

mately accurate today, except that the percentage of minority tenants has probably increased slightly due to a small increase in the percentage of Starrett City units occupied by blacks. The lower representation of minorities in the apartment unit statistics as compared to the population statistics is due to the higher average number of residents in minority-occupied units.

86. In my judgment, Starrett City was able to agree to the provisions of the consent decree in *Arthur*, mandating a moderate increase in the number of apartments occupied by black and Hispanic tenants, only because Starrett City had already established itself as a stable, racially integrated development. This has enabled Starrett City to accommodate a somewhat larger minority population than would have been otherwise possible.

87. In my opinion and that of experts consulted by Starrett City, to expand the minority population of Starrett City beyond its current levels would create a very substantial risk that the move-out rate of white tenants would increase dramatically, and that Starrett City's already limited ability to attract white tenants would disappear altogether. If this were to happen, Starrett City would begin an irreversible transformation to a segregated community. This conclusion is confirmed, in my view, by the current composition of the Starrett City waiting list, which I describe below.

88. The racial composition of the Starrett City waiting list for one-bedroom apartments as of March 31, 1986 was as follows:

Race	*Number of Applicants*	Percentage
White	1,645	24.0
Black	4,153	61.0
Hispanic	775	11.5
Oriental	61	1.0
Other	71	1.0
American Indian	36	.5
Mixed	58	1.0
Total	6,799	100%

89. The racial composition of the Starrett City waiting list for two-bedroom apartments as of March 31, 1986 was as follows:

Race	*Number of Applicants*	*Percentage*
White	911	16.3
Black	3,468	62.0
Hispanic	865	15.5
Oriental	127	2.2
Other	119	2.0
American Indian	48	1.0
Mixed	42	1.0
Total	5,580	100%

90. The racial composition of the Starrett City waiting list for three-bedroom apartments as of March 31, 1986 is as follows:

Race	*Number of Applicants*	*Percentage*
White	185	14.0
Black	536	40.5
Hispanic	390	29.5
Oriental	90	7.0
Other	61	4.5
American Indian	46	3.5
Mixed	12	1.0
Total	1,320	100%

91. The following chart shows, both in absolute terms and as a percentage of all the apartments at Starrett City, the number of apartments vacated at the development in each of the past four years:

Year	*Number of Apartments Vacated*	*Percentage of All Apartments*
1982	466	7.9
1983	431	7.3
1984	422	7.2
1985	460	7.8

92. Over the last five or six years, whites have moved out of Starrett City in numbers slightly higher than their numerical representation in the tenant population would suggest. Blacks have moved out in significantly lower numbers than their representation would suggest; Oriental tenants and others have moved out in substantially higher numbers than their representation would suggest.

93. The racial composition of Starrett City's waiting list and the current turnover rate show that, even setting aside the possibility of "tipping," a first-come, first-served tenant selection policy would quickly transform Starrett City into a predominantly minority community. The waiting lists for one-, two-, and three-bedroom apartments are, respectively, approximately 76.0%, 83.7%, and 86.0% non-white; black applicants make up 61.0%, 62.0%, and 40.5% of the lists. The current turnover rate is high enough so that under a first-come, first-served tenant selection policy, the racial makeup of the tenant population would soon reflect that of the waiting list.

94. In my opinion, however, the move-out rate for white tenants would be virtually certain to increase dramatically under a first-come, first-served policy. In addition, many fewer whites would apply for apartments, and many fewer whites would accept apartments offered to them. I have seen this process occur at numerous locations in New York City, including several housing developments near Starrett City—*e.g.*, Linden Houses, Pink Houses, Boulevard Houses, and Fairfield Towers.

95. Once the tipping process has started, it is exceedingly difficult, if not impossible, to reverse. Given the current composition of Starrett City's waiting list, combined with the various other factors affecting Starrett City's applicant pool, it is virtually certain that, if Starrett City were not to consider race in the renting of its apartments, the integrated character of the development would be destroyed. The expectations, understandings, hopes, and preferences of Starrett City's tenant population would be defeated, and the harmony and diversity achieved at great expense and maintained through years of effort by residents and management alike would be irretrievably cast aside.

96. Starrett City believes that the promotion of integration and the avoidance of segregation are, in and of themselves, sufficient justification for the rental practices now in use at Starrett City. Our views are reinforced, however, by the extensive experience, in New York and other cities, with once-integrated housing developments that have become virtually all-minority. The quality and safety of the housing in such developments, and the general quality of life available to residents, have frequently declined markedly after a rapid transition to an overwhelmingly minority tenant population.

97. If such problems were to develop at Starrett City, they would be particularly serious, given the size of the development and the range of services the development provides for its residents. For example, Starrett City contains a nursery school and public intermediate and elementary schools, in all of which the percentage of minority students is higher than the percentage of minority residents in the development as a whole. These schools would very quickly face the danger of *de facto* racial segregation if the government were to prevail in this lawsuit. Moreover, Starrett City residents depend heavily on the extensive shopping and recreational facilities provided within the development, facilities not typically offered at smaller projects. As a result, the impact of any possible deterioration of facilities might well prove more significant at Starrett City than elsewhere.

98. Starrett City will, of course, attempt to maintain current standards regardless of the outcome of this litigation. The resources available for that purpose are not unlimited, however. Starrett City cannot simply afford to spend whatever amount of money is necessary to maintain current standards, if, following a change in the character of the development, that task becomes more and more difficult and expensive. And, in any event, many aspects of the damage to housing developments caused by racial segregation are simply beyond the control of management.

99. The stability of Starrett City is currently threatened from many quarters. This litigation is, of course, a major concern for tenants, who fear that the character of their community may

soon be abruptly changed. The average income of Starrett City residents is currently declining.[6] Although the success of Starrett City has sparked improvements in the immediately adjoining areas of East New York, particularly along Pennsylvania Avenue, East New York continues to be a poor, predominantly minority, and unsafe neighborhood. All these conditions would make even a small increase in the present minority population at Starrett City very perilous. The enormous increase in minority tenants that would follow from the government's position would, in my opinion, doom any hope of continued racial integration at Starrett City and would deal a severe, if not fatal, blow to the beginnings of restoration and revitalization that Starrett City has helped introduce into East New York.

100. As I see it, this case involves a balancing of competing benefits and costs. It is conceded that, if the government were to prevail here, some additional apartments at Starrett City would very quickly become available to minorities. We can even assume, for the sake of argument, that *all* of the Starrett City apartments now occupied by whites would eventually be occupied by minorities. That would add approximately 3,500 apartments to the existing housing stock for low-income and middle-income minority residents of Brooklyn and Queens. That number of apartments would be sufficient to house only about a third of the minority applicants currently on Starrett City's waiting list. More important, even that limited benefit could not be achieved without substantial—and, in my view, excessive and disproportionate—costs.

101. Destruction of the integrated character of Starrett City, and the elimination of Starrett City as a model of successful, integrated, publicly assisted housing, is a price too high to pay for 1,500 or 2,500 or even 3,500 additional minority apartments at Starrett City. Minorities will benefit far more if the current character of Starrett City can be preserved as an example of what can be accomplished through concerted public and private action designed to make integration work. That example will

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6 A Starrett City business record that documents the "trend toward higher income tenants moving out and lower income tenants moving in" is annexed hereto as Exhibit L.

not be lost on developers and public officials, and minority housing opportunities will improve as a result.

102. Moreover, even disregarding such practical considerations, the objective of true and lasting integration—bringing persons of different races together after years of segregation by law and custom and prejudice—is, in my view, a sufficiently compelling benefit to justify the limited cost imposed on minority applicants now on Starrett City's waiting list.

103. The future of Starrett City is, of course, deeply important to me, but many years of experience in the housing industry enable me to assure the Court that much more than the future of one housing project is at stake here. Challenges similar to those that Starrett City has successfully faced in its struggle to achieve and maintain racial integration also face housing developments and state and local governments throughout the United States. The interventionist methods used at Starrett City are often the only ones that work. If racial integration is to be a living, day-to-day reality rather than a vague and abstract piety, the managers of housing developments, working together with state and local government officials, must be permitted to use the tools that they need to achieve the purposes of the Fair Housing Act.

/s/ ROBERT C. ROSENBERG
Robert C. Rosenberg

Sworn to before me
this 29th day of April, 1986

/s/ AILEEN J. AMOROSO
Notary Public

AILEEN J. AMOROSO
Notary Public, State of New York
No. 41-4625183
Qualified in Queens County
Commission Expires October 31, 1988

SITE PLAN

Site plan is being submitted to the
Court as a lodging contemporaneously
with the petition

Rosenberg Exhibit C

March 9, 1972

836

Cal. No. 48.

Housing and Development Administration; Starrett City, Inc.; Twin Pines Village, Inc.—Approval of Conversion of State-Aided Limited-Profit Housing Project (Twin Pines Village) Located on Louisiana Avenue, Flatlands Avenue, Miller Avenue and Shore Parkway, Brooklyn, from Cooperative to Rental Project.

(Second Call)

The Secretary presented a communication dated February 3, 1972, from the attorneys for Twin Pines Village, a State-aided housing project, bounded generally by Louisiana, Flatlands and Miller Avenues and Shore Parkway, Borough of Brooklyn, requesting approval of the conversion of the subject project from a cooperative form of ownership to a rental form of ownership, and submitting a resolution relative thereto. On December 21, 1967 (Cal. No. 14), the Board of Estimate approved the aforesaid project.

On February 10, 1972 (Cal. No. 239), the matter was laid over to this meeting.

Malcolm Fein, a member of Community Planning Board No. 17, Brooklyn, appeared in opposition.

The following appeared in favor:

Harold Ostroff, representing United Housing Foundation; Marvin Markus, representing Citizens' Housing and Planning Council; Robert Olnick, Chairman of the Board of Starrett Housing Corporation; Daniel Shapiro, President of Congregation Beth Israel, in the Spring Creek area of East New York; Ben Fishman, representing Plumbers' Local No. 2; and Robert J. Cutting, Secretary of the Building Trades Employers' Association.

Statements were made by the Executive Secretary to the Mayor, the Acting Comptroller, the President of the Council,

the Acting President of the Borough of Manhattan and the President of the Borough of Brooklyn.

Statements were made on roll call by the Executive Secretary to the Mayor, the Acting Comptroller, the President of the Council and the President of the Borough of Brooklyn.

The following resolution was offered by the President of the Council:

Whereas, The Board of Estimate, on December 21, 1967 (Cal. No. 14-B) has approved a limited-profit cooperative housing project submitted by Twin Pines Village, Inc. and granted said project exemption from local and municipal taxes, other than assessments for local improvements, to the extent set forth in the resolution adopted on said date; and

Whereas, Twin Pines Village, Inc. and Starrett City, Inc., both corporations organized pursuant to Article 11 of the Private Housing Finance Law, have submitted to the Board of Estimate their application for the approval of the conversion of the project from a cooperative to a rental project, to be accomplished by the sale of all the assets, subject to all the liabilities of Twin Pines Village, Inc., a mutual housing company, to Starrett City, Inc., a rental housing company, now, therefore, be it

Resolved, That the conversion of the Twin Pines Village project from a cooperative to a rental housing project, is hereby approved; and be it further

Resolved, That the tax abatement heretofore granted to said project pursuant to the aforesaid resolution of the Board of Estimate, shall be and remain applicable to the project when transferred to Starrett City, Inc., upon all the terms and subject to all of the conditions set forth in the aforesaid resolution of the Board of Estimate.

The foregoing is approved subject to the condition that Starrett City, Inc. will execute an agreement, approved as to form by the Corporation Counsel, assuming all the terms and conditions of the agreement between the City of New York and Twin Pines Village, Inc., which agreement was approved by the Board of Estimate on December 21, 1967 (Cal. No. 14-A).

Which was adopted by the following vote:

Affirmative—The Executive Secretary to the Mayor, the Acting Comptroller, the President of the Council, the Acting Presidents of the Boroughs of Manhattan, The Bronx and Queens and the President of the Borough of Richmond—20.

Negative—The President of the Borough of Brooklyn—2.

Note—This resolution was adopted subject to favorable reports of the Corporation Counsel and the Director of the Budget.

Cal. No. 49.

Economic Development Administration; New York Yankees, Inc.—Proposed Lease of Yankee Stadium, The Bronx.

The Secretary presented a report dated February 9, 1972, of the First Assistant Corporation Counsel (printed in the Journal of Proceedings of the meeting of February 10, 1972—Cal.

* * *

Rosenberg Exhibit D

[Letterhead of the Department of HUD]

In Reply Refer to:

2.1E (Forman)
012-35-NI
Starrett City
Bklyn, NY

Ms. Sharon M. Keilin
Assistant General Manager
Starrett City
121-50 Flatlands Avenue
Brooklyn, N.Y. 11207

June 18, 1975

Dear Ms. Keilin:

We have reviewed and found acceptable your Affirmative Marketing Plan for the above project, pursuant to the Affirmative Fair Housing Marketing Regulations (Title 24 CFR Part 200). The approved plan (attached) must be available for public inspection by any interested group or individual at the project's Rental Office.

During the present rent-up period you may deem it advisable to make certain adjustments or alterations in the method of administering your Plan. However, it should be understood that any change in your Affirmative Marketing Plan as originally submitted must be approved by this office.

Your monthly reporting on HUD Form 9801 (attached) should continue until the project is 95% occupied or six months after all units in the project become available, whichever comes first, and annually thereafter.

If at any time you desire our services or assistance in fostering equal housing opportunity within your project, please do not hesitate to call Mr. Eli Forman at (212) 974-7544.

Sincerely,

/s/ GRACE E. MALONE
Grace E. Malone
Director
Equal Opportunity Division

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

AFFIRMATIVE FAIR HOUSING MARKETING PLAN

APPLICANT'S NAME, ADDRESS AND ZIP CODE Delmar Management Company 121-50 Flatlands Avenue Brooklyn, New York 11207	PROJECT OR APPLICATION NUMBER 012-35-NI SECTION OF ACT 236	
NAME AND LOCATION OF PROPOSED HOUSING Starrett City Spring Creek, Brooklyn, N.Y.	CENSUS TRACT 1100, 1106, 1102	NUMBER OF UNITS 5881

1. DIRECTION OF MARKETING ACTIVITY

The affirmative Fair Housing Marketing Regulations require that each applicant carry out an affirmative program to attract prospective buyers or tenants of all minority and majority groups to the housing. State which group(s), in your judgment, are normally *not* likely to apply for the housing without special outreach because of factors such as existing neighborhood racial or ethnic patterns, price, and other factors.

White families and individuals, particularly senior citizens; Ethnic groups not presently residing in this area of Brooklyn-Greek, Oriental, Puerto Rican.

2. MARKETING PROGRAM

Newspapers (*Approximate frequency and description of use*) _____

(1) New York Times—Display ads each month; classified ads twice/week.

(2) Other major dailies (NY Post, News; Long Island Press) as needed.

(3) Ethnic and ecumenical newspapers (Amsterdam News—black audience; Catholic Tablet; Jewish weeklies; El Diario-Puerto Rican audience.)

Radio and TV (*Approximate frequency and description of use*) _____

WCR Radio—occasional spots as needed (general majority audience)

WEVD Radio—occasional spots as needed (white ethnic audience; elderly)

WMCA Radio—occasional spots as needed (general audience; broadcasts local sports games where spots will be placed).

Brochures and Signs (*Enclose description or, where possible, copies, drafts or pictures.*) _____

See attachment.

Community Contacts (*List organizations to be contacted and describe method of contact.*) _____ The following have or will be utilized for outreach and referrals. Contact will be personal and by telephone. Jewish Assn. for services to the aged ("JASA"), Boulevard-Penn-Wortman Senior Citizens Center, V.F.W., County V.A. Hospitals, Italian American Civil Rights Organizations, Urban League Open Housing Center. The list will be expanded as we become aware of other community organizations.

State what results applicant reasonably expects in terms of occupancy from special outreach efforts: _____

See attachment.

Describe the marketing program you intend to use in filling vacancies (*in multifamily projects*) as they occur after the project has been fully occupied.

See attachment.

DEPT. HSG. & URBAN DEV.
New York Area Office
Equal Opportunity Division
JUN 17 1975
[ILLEGIBLE]
APPROVED

3. STAFFING

What company will be responsible for the marketing program? Fairfaix Advertising, Inc.
260 Madison Ave., New York, NY 10016.

What is its experience in marketing successfully to a racially and ethnically varied population? Fairfaix is one of the oldest firms in New York, in continuous operation since 1893. The firm has marketed or is currently marketing several thousand State and NYC-assisted units, including waterside and North Waterside, Roosevelt Island, Stevenson Commons, all with Federal 236 subsidies.

What company will be responsible for sales or initial and continuing rental?
Delmar Management Company, 121-50 Flatlands Avenue, Brooklyn, NY 11207 (a subsidiary of Starrett Housing Corporation and National Kinney Corporation, general partners of Starrett City, Inc., owners.)

Describe nondiscrimination hiring policy applicable to staff engaged in sale or rental of properties and indicate present racial composition of sales/rental staff. It is not the policy of Delmar Mgt. Co. to discriminate in the hiring of its rental staff. Applicants are hired on the basis of qualifications and not on majority or minority status. Present full-time staff of 6 includes 1 black, 1 Spanish-American, 1 Albanian-American and 3 majority individuals, of whom 2 are male and 4 female.

Indicate number of additional positions to be filled in sales/rental staff, and describe steps which have been or will be taken to recruit from both majority and minority groups. Staff is presently complete. As openings occur, above-described policy will be followed. Delmar maintains a file of applicants who have applied for these positions. In addition, as necessary, advertising will be in major dailies read by a wide cross-section of the area.

Enclose a copy of instructions given to all employees regarding compliance with local, State and Federal fair housing laws. See attachment.

Describe training given to all employees regarding implementation of fair housing laws and this affirmative fair housing marketing plan: See attachment.

4. Solicitation of those referred by HUD. Solicitation will be ☑ DIRECT MAIL ☑ TELEPHONE CONTACT ☑ OTHER (*Specify*) Personal contact as appropriate.

5. Please describe other efforts planned as part of your outreach program not adequately covered by this form:
In order to encourage ethnic groups not presently residing in the neighborhood and to make them feel comfortable here, Delmar will hold all-day ethnic festivals on-site during the spring and summer, and will publicize them in local newspapers, through appropriate cultural organizations, etc.

6. The applicant agrees to make any changes in a plan covering a multifamily project which may reasonably be required after initial rent-up to assure continued compliance with Section 200.620 of HUD's Affirmative Fair House Marketing Regulations

May 31, 1975
Date

/s/ SHARON M. KEILIN
Signature

SHARON M. KEILIN
Name (Type or Print)

ASSISTANT GENERAL MANAGER
Title

Rental, Residential and
Community Relations

INSTRUCTIONS FOR FILING AN AFFIRMATIVE FAIR HOUSING MARKETING PLAN

1. *DIRECTION OF MARKETING ACTIVITY.* The affirmative fair housing marketing plan (hereinafter referred to as the "affirmative marketing plan" or "the plan") shall be designed to attract applications for the housing from all groups in the SMSA, or if there is no SMSA, the housing marketing area, including whites, Blacks, Spanish-Americans, Orientals, American Indians, and other groups which are subjected to housing discrimination on the basis of race, color, religion or national origin.

   The program should include efforts to reach those persons who traditionally would not have been expected to apply for the housing. For instance, for housing in a white suburban area, special steps may be needed to make its availability known to minorities; similarly, if the housing is located in an area of minority concentration, special steps may be needed to make its availability known to whites.

   In housing which includes several income levels, effort should be made to avoid concentrating minority occupants in any one income group.

2. *MARKETING PROGRAMS.* In order to develop an affirmative marketing program, an applicant should look at his normal marketing methods such as use of press, radio, TV, brochures, signs, community contacts, and then determine how the methods he now uses can be utilized to reach out to persons who otherwise might not apply for the housing. If it is anticipated that applications greater than the number of units will be made almost immediately after applications are first received, resulting in an "instant rent-up," advertising and outreach to those persons who traditionally would not have been expected to apply for the housing should be conducted for a period of time prior to the normal period for receipt of applications.

   a. *Advertising.* If the applicant contemplates using an advertising firm, it should consider using one that has expe-

rience in marketing successfully to a racially and ethnically varied population.

All advertisements shall include prominent use of the Equal Housing Opportunity Logotype, Slogan, or Statement, and all advertising depicting persons shall depict persons of majority and minority groups. (See Appendix 1 for the Logotype, Slogan, and Statement.) The Equal Housing Opportunity Slogan utilized in newspaper display advertisements should be at least 8 point bold face type. The content of advertising should conform to HUD's proposed Advertising Guidelines for Fair Housing (Appendix 7).

Copies of all advertising materials should be kept on file by the applicant so that they are available to show how the affirmative marketing plan has been implemented and can be utilized as exhibits to any future affirmative marketing plan to be submitted.

(1) *Communications Media.* Describe use of communication media, stating name of newspaper, radio, or TV station, identifying as to whether majority, minority, or both in circulation or audience, and stating the approximate frequency and size/time of advertisements to be placed.

(2) *Signs.* Describe sign(s) advertising the housing (on-site and elsewhere). Give the size of the Equal Housing Opportunity insignia. The site sign should be large and should be set up when construction begins. Provide photograph of sign, when erected.

The Fair Housing Poster must be placed wherever sales or rental of the housing can take place—the model home; rental or sales office; real estate office. (See Appendix 6.)

(3) *Brochures.* Describe brochures, leaflets and all other printed matters relating to the housing. Copies should be provided to the HUD Equal Opportunity Director or Representative if available.

b. *Community Contacts.* In smaller communities where there are no formal communications media in the minority community, special outreach efforts must depend upon community contacts. Community contacts may also be useful in smaller communities in reaching specific elements of the white community, such as the elderly, or particular ethnic groups. In larger communities, a few community groups such as fair housing councils may be a useful supplement to use of major communications media.

Name community groups whom you expect to contact, give racial/ethnic identification of each, and state the nature of anticipated contact (mail or visit) and approximate frequency of contact. Enclose copies of any letters to be sent.

Strong contact can be made by meeting the leader of the group, showing him the housing, and asking to speak before the group. Churches, social, civic and fraternal organizations and labor unions are useful. Small businesses such as barber shops, beauty parlors, and shoe repair shops may be utilized for distribution of brochures and other material. Personnel departments of major employers such as industrial plants or local, state or federal government agencies may help disseminate housing information.

c. *Anticipated Results.* The statement of anticipated results should be realistic in terms of the proportion of minority persons at the appropriate income level in the metropolitan area (or, if outside an SMSA, the housing marketing area) and in terms of specific considerations relating to the proposed housing such as location, unit sizes, unit price, amenities provided, accessibility to desirable jobs, shopping areas and educational opportunities, and other factors.

3. *STAFF ENGAGED IN SALE RENTAL ACTIVITY.* Name the organization which will be in charge of sales or initial and continuing rental activity and state its nondiscriminatory hiring

policy and its present racial composition. Describe expected recruitment efforts.

All staff, professional and clerical, should be instructed in writing as well as orally that it is the policy of the applicant (and his sales/rental agent, where applicable), to obey all applicable fair housing laws, to refrain from discriminating regarding any application for housing on the basis of race, color, religion or national original and affirmatively to promote fair housing. Each member of the staff should be furnished a copy of the approved affirmative marketing plan and copies of Executive Order 11063 and Title VIII of the Civil Rights Act of 1968. The staff should also be aware of all applicable state laws and local ordinances.

No affirmative marketing plan can be successful unless the sales/rental staff is thoroughly prepared to deal responsively with the persons the marketing brings to the housing. Training of sales/rental staff should include a discussion of the purposes and details of the affirmative marketing plan prepared by the applicant and preparation for any questions concerning the racial/ethnic composition expected in the housing which may be asked by minority and majority applicants. It is highly desirable to include a question-and-answer period with an official of a state or local agency administering a fair housing law or (when available) with a HUD staff member who works in the administration of the federal fair housing law. It would be clearly stated that minority or majority persons cannot be limited to a part of the housing on the basis of race, nor can different processing procedures be utilized on the basis of race. Persons applying as a result of special outreach to bring them to housing where they might not otherwise apply my be initially ill at ease and unwilling to seek out all the assistance they need from sales/rental staff. Staff should be instructed in techniques which will assure that such assistance is given. Minority persons may suspect discrimination in procedures which are unfamiliar to them although these may be routine procedures in a particular sales/rental firm. To avoid such misunderstandings, it is wise to prepare written sheets which describe processing pro-

cedures which are used explaining such things as how applications are taken, how eligiblity is determined, the nature of and the length of time for the credit check, etc. Staff should be advised to make this written information available to all applicants and to offer to give any additional information which may be helpful.

4. *SOLICITATION OF THOSE REFERRED BY HUD.* In most cases solicitation should be made by direct mail with local telephone follow-up. A report on this activity and the result should be made to the HUD office monthly.

5. *TIME OF HUD APPROVAL OF PLAN.* The plan will be submitted by the applicant for HUD assistance on a multifamily project with the application for feasibility. If the plan does not provide satisfactory information, it will not be approved and must be resubmitted. If the plan has not been approved by the time a feasibility letter is issued, the letter will advise the applicant of any deficiencies. In such event, the plan must be resubmitted and approved by HUD prior to the issuance of a conditional commitment (or firm commitment when conditional commitment is omitted).

   Applicants for HUD assistance in the home mortgage programs will submit a plan with the application for subdivision report (for subdivisions), the application for conditional commitment. FHA Form 2800 (or scattered units not subject to a subdivision report) or the request for reservation of funds (if there has been no subdivision report or Form 2800). The plan must be approved prior to the issuance of any subdivision report, approval of FHA Form 2800, or reservation of 235 funds.

2. *MARKETING PROGRAM*

   Brochures and Signs

   Brochures include architect's rendering of the site, floor plans of each size apartment and description of amenities.

   We do not anticipate relying heavily on signage for advertising purposes. As the development is somewhat isolated, applicants largely will be drawn in by display and classified

newspaper advertising and by community contacts, ethnic and cultural organizations, etc.

Sign at northern end of development will be standard New York State Division of Housing and Community Renewal format (this development is a New York State-assisted project under Article II of the New York State Private Housing Finance Law).

Because extensive "copy" cannot reasonably be read from the Belt Parkway which runs south of the development at some distance from the gate, locational signs will be used in this area.

We will also utilize large posters in subway stations in selected outreach neighborhoods.

Fair Housing poster will be displayed in the Renting Office as required.

The *Starrett City Sun* our own community newspaper is distributed in ethnic areas around the City as a way of introducing Starrett City as a community and also to reach out to other neighborhoods.

Because of the size of the development and the number of units it adds to the area housing market, we are seeking to draw from a wider area to avoid an overwhelmingly negative impact on adjacent transitional areas.

Anticipated Results

We anticipate and will encourage a good economic, social and racial mix at Starrett City. Because the development is located near and easily accessible to East New York, a predominately low-moderate income black neighborhood, and is physically separated by an unbridged waterway (Fresh Creek) from the adjacent predominately white community of Canarsie, we anticipate that considerable outreach will be necessary to attract eligible majority and non-black minority families and individuals.

Senior Citizens will be actively sought through display advertising features relevant amenities and, as rent-up progresses, featuring early Senior Citizen tenants. We anticipate

placing these advertisements not only in mass circulation dailies, but in local papers read widely by the elderly, such as the Catholic *Tablet* and Jewish weeklies.

Reflecting the social and ethnic composition of surrounding neighborhoods, we would hope to achieve a social mix of 70% majority and 30% minority occupants.

Filling Vacancies after Initial Occupancy

Delmar Management will maintain its own waiting lists in chronological order from date of application, always attempting to maintain good age and ethnic mixes. We expect to maintain contacts with community groups who can be helpful in outreach, and will use classified advertising as necessary.

3. *STAFFING*

Instructions and Training Given to Employees

The staff will be advised of all local, state and federal fair housing laws. A commitment to the fair housing law will be a condition of employment. All permanent and temporary staff will receive verbal instructions as well as available brochures, pamphlets and written instructions in order to implement the fair housing law as well as the affirmative fair housing plan. Any changes in applicable laws and regulations will be given to employees.

Evening sessions are planned in which typical interview situations will be simulated and staff will discuss approaches to dealing with them. Stress will be placed on learning to deal fairly with each applicant, regardless of background.

Rosenberg Exhibit E

[Letterhead of Executive Department of the Division of Housing and Community Renewal, State of New York]

February 20, 1975

Starrett City, Inc.
909 Third Avenue
New York, New York 10022

Attention: Robert S. Olnick, Esq.
Chairman

Re: Starrett City, Brooklyn, New York
Mortgage No. HCLP 67-612

Gentlemen:

We are in receipt of and refer to the following:

1. Letter of Starrett City, Inc. to Commissioner Lee Goodwin dated November 18, 1974 requesting a mortgage increase for the subject project of $36,455,500;

2. Letter of Starrett Brothers and Eken, Inc. and Jespersen-Kay Modular Construction Ltd., a Joint Venture, to Starrett City, Inc. dated November 18, 1974 requesting an increase in Construction Contract IV dated July 6, 1972;

3. Various Change Proposals of Starrett City, Inc. submitted to Commissioner Goodwin subsequent to November 18, 1974, and;

4. Letter of Starrett City, Inc. to Commissioner Lee Goodwin dated January 31, 1975, modifying the mortgage increase requested in "1" above to $51,155,000.

Please be assured that our staff is reviewing the above submissions and will review the additional "back-up" data to be submitted in connection therewith.

We are cognizant of the fact that your original submission of November 18, 1974 assumed a rent-up of 100 dwelling units per

week and that such assumption is unlikely to be achieved under the present marketing plan heretofore submitted to and approved by us, which plan is designed to achieve a racially balanced community.

It is this department's policy to assist a developer in achieving a fully integrated and balanced development that will benefit both the project and its surrounding community.

Accordingly, you are requested to continue your current rental program with our assurance that, subject to the availability of adequate federal subsidy and consistent with policies and procedures of the Division, we will approve your request for an increase in the amount of the mortgage to cover acceptable over-runs in operating expenses which we determine to be reasonably necessary to accomplish a fully integrated and balanced community.

Sincerely yours,

/s/ LEE GOODWIN
Lee Goodwin
Commissioner

[ILLEGIBLE]

K-51

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

84 Civ. 2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT CO.,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DR. KENNETH CLARK, being duly sworn, deposes and says:

Introduction

1. I am a social psychologist and a lifelong civil rights activist. I have spent the last 40 years fighting for equal rights and studying the problems that confront blacks in our society. I have published more than one hundred and thirty (130) works dealing with these issues. My curriculum vitae is attached as Exhibit A.

2. I have been involved in a number of civil rights litigations and have served as an expert witness in both school desegregation cases and housing discrimination cases. I testified in three of the lower court cases that led to the Supreme Court's landmark decision in *Brown* v. *Board of Education*, and I authored the social science appendix, dealing with the effects of segrega-

tion on children, that was submitted to the Supreme Court in that case.

3. From 1942 until 1975 I served on the faculty of The City College of New York. In 1975 I retired as a Distinguished University Professor and formed a consulting firm, Clark, Phipps, Clark & Harris, Inc. The firm was established to provide professional consultation on personnel matters to private corporations and government agencies, with particular emphasis on human relations, race relations, and affirmative action programs. The firm has counselled a number of foundations, private corporations, and educational institutions, including the N.A.A.C.P., the United States Department of State, Princeton University, American Telephone & Telegraph, Chemical Bank Corporation, Consolidated Edison, and the United States Department of Labor.

4. In the summer of 1979 my firm was retained by the New York State Division of Housing and Community Renewal ("DHCR") to conduct a study concerning integration at Starrett City. Annexed hereto as Exhibit B is my letter, of June 1, 1979, to Lloyd Kaplan, Deputy Commissioner of DHCR, setting forth my firm's proposal for such a study. In January 1980, my firm issued its report entitled *Starrett City: A Study Of Ways Of Maintaining An Integrated Residential Community*. A copy of this report ("Clark I") is annexed as Exhibit C.

5. Shortly after the plaintiffs filed their complaint in *Arthur, et al.* v. *Starrett City Associates, et al.*, we were asked to prepare a second report and I was retained by counsel for the Starrett defendants and DHCR to serve as an expert witness. Our second report, entitled *Black Residents' Views About Residential Integration and Maintaining It At Starrett City*, deals with the views of black residents at Starrett City. A copy of this report ("Clark II") is annexed hereto as Exhibit D.

6. In retaining me as an expert witness, the Starrett defendants and DHCR asked me to testify on:

(a) what is needed to maintain integration at Starrett City (Clark I);

(b) how blacks at Starrett City feel about integration (Clark II); and

(c) the benefits of integration versus the negative effects of segregation.

7. As a consequence of my career as a social psychologist, my lifelong involvement with civil rights, and my work in preparing Clark I and Clark II, I feel that I am fully qualified to give expert testimony with respect to each of these issues.

Clark I

8. The focus of Clark I was "the process by which to achieve and maintain an integrated residential development" (Ex. C, p. 3). In connection with preparing Clark I, my staff collected and analyzed materials from a variety of sources. Our work included:

(a) a review and analysis of relevant literature on housing;

(b) interviews with a representative sampling of more than 100 Starrett City residents to ascertain (i) the degree of their satisfaction or dissatisfaction with various aspects of life in Starrett City, such as maintenance, transportation, recreational facilities, and schools; (ii) their perception of the racial composition of the community; and (iii) their reaction to that perception; and

(c) an examination of the pattern and process of integration and/or segregation in "comparable" housing developments. This afforded us valuable insight on the tipping point, accelerated segregation, and the consequences of segregation in these residential communities.

We also examined the files of Starrett City's managing agent, Delmar Management Co., and monthly occupancy reports that were filed with HUD. A summary of Clark I follows.

9. From the outset, Starrett City clearly stated its commitment to racial integration. In agreement with federal and state housing agencies, an initial goal of 70% majority and 30% mi-

nority residents was established. As stated in our report, every effort was made to meet the goal of a fully integrated development. Our review of Starrett City's tenant records revealed that in June of 1979 the ratio of majority to minority tenants, by apartment unit, was 64% to 36% and that in December of 1979 the comparable ratio was 65% to 35% (Ex. C, p. 25).

10. Early in the planning stage at Starrett City, it became evident that if integration was to be achieved it was essential to have a systematic plan that would take race into account. Because of a disproportionate demand on the part of minority applicants, especially blacks, we noted in Clark I that in order to achieve and maintain the 65%/35% ratio Starrett City management had to treat applicants differently based on race. The government has labelled this differential treatment discriminatory. But given the circumstances at Starrett City and the high minority demand for housing, we found that Starrett City's selection procedures were essential to achieving and maintaining an integrated residential community.*

11. Our survey of tenants' attitudes revealed that whites tend to overestimate the percentage of minorities in Starrett City. (See, *e.g.*, Ex. C, p. 41, Table 6.) This tendency of whites to overestimate the presence of minorities strongly suggests the potential for tipping. For this reason, among others, I believe that maintenance of a stably integrated community at Starrett City requires that the proportion of minority tenants be controlled.

12. In Clark I we concluded that, given the history of discrimination against minorities on the basis of race in New York City and other housing markets, a first-come, first-served rental policy at Starrett City would lead to a segregated housing development. Such a transformation at other projects has frequently

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* Because of discrimination, the supply of housing available to minorities is more restricted than that available to whites, and the percentage of minorities living in inadequate housing is higher than the corresponding percentage of whites. As a consequence, subsidized housing developments like Starrett City, which welcome minorities, frequently attract an applicant pool in which minorities are disproportionately represented.

been followed by a marked decline in services, maintenance, and the quality of schools and housing. This in turn tends to reinforce feelings of lower status and inferiority held by minorities living in racially segregated communities.

13. Based on my firm's research and our survey of tenant perceptions, it is our opinion that the percentage of minorities that could trigger tipping is probably around 40% on a population basis. That Starrett City continues to be stably integrated despite a minority percentage approximating 45% is attributable to (a) the community's belief in Starrett City's commitment to continued integration; (b) management's substantial efforts at maintaining the quality of Starrett City services; and (c) Starrett City's overall success as an integrated community.

14. One should not be fooled however. Majority and minority tenants alike have severe misgivings about Starrett City's ability to continue to survive as an integrated community. If those misgivings are confirmed by, for example, a sudden influx of minority tenants, the consequence could very well be that the project would lose its more stable white and minority tenants and begin to tip. If this process begins, it is likely to be irreversible.

15. At the outset of Clark I, we noted that laws designed to end discrimination and promote integration have been for the most part ineffective. Segregated minority housing remains a major and seemingly unchangeable reality of American life. One need only take a tour of New York City to realize this. Minorities continue to live primarily in pockets of high minority concentration, and attempts at further integration have made exceedingly slow, if any, progress.

16. New York City schools also remain largely segregated; attempts at meaningful integration have met with frustration and failure. As a member of the New York State Board of Regents from March 1966 through March 1986 I know this firsthand. Thirty years after the Supreme Court's decision in *Brown* v. *Board of Education*, the percentage of black children going to segregated and inferior schools is greater now than it was at the time of *Brown*.

17. It is evident therefore that the goal of achieving an integrated society cannot be left to natural market forces alone. Such an approach has only produced, and will continue to produce, concentrated minority ghettos.

18. If we are to avoid segregation, we must take affirmative steps to integrate. To do this we cannot be colorblind, and it is imperative that we define discrimination in terms of preventing segregation and separation. In my opinion, management is not engaging in arbitrary discrimination when it vigorously carries out a plan to create and maintain a racially integrated community. The only alternative is continued segregation; that would be a clear-cut victory for racism.

19. The overall conclusion of our first study is that to create and maintain an integrated residential community in the context of an overall social and racial pattern in which minorities, particularly blacks, have not had, and do not have, equal access to housing, the following conditions must be met:

(a) There must be a clearly stated commitment to integration;

(b) Procedures and criteria must be developed for the recruitment and selection of tenants in line with the objective of integration; and

(c) There must be a steadfast enforcement of the requirements of racial balance, and the proportion of minority tenants must not be permitted to become too high.

20. Starrett City has done these things and that is why it continues to be successfully integrated. In today's society, there simply is no other way.

Clark II

21. Our work in connection with Clark II focused on the attitudes and perception of black heads of household at Starrett City towards integration. During a three-week period in April and May 1980, telephone interviews were conducted with a randomly selected sample of 300 black residents.

22. We specifically tried to develop information on: (a) the views of blacks about residential integration; (b) black perceptions and expectations of racial integration at Starrett City; and (c) the views of blacks as to the options management might exercise in order to achieve and maintain racial integration at Starrett City.

The Importance of Racial Integration

23. One of the key conclusions of Clark II was that a great preponderance of blacks at Starrett City strongly desire residential integration. This is confirmed by the following findings:

(a) Three out of five persons surveyed reported that living in an integrated community is important or very important to themselves and their households.

(b) Two out of three household representatives thought there should be more integrated housing in the area.

(c) Three-fourths of the respondents identified some type of integrated housing as offering the best chance for adequate housing for blacks.

(d) Nearly one-half of the sample perceived Starrett City as integrated before moving there.

(e) Three out of five of those who thought that Starrett City was integrated before they moved in said that that perception was either important or very important to their decision to move.

Perception and Definition of Residential Integration and Tipping Points

24. In general, the data seem to establish that there are strong dispositions among black residents that favor both integrated housing and the presence of a significant percentage of whites—at least 50%—to ensure preservation of a development's integrated status. This is confirmed by the following findings:

(a) More than half (55%) of the sample of black residents defined racially integrated housing in terms of a crit-

ical mass of 30 percent or more blacks and other minorities. A sizable minority of about one-fourth (23.3%) thought the percentage of minorities should be less than 30 percent.

(b) The proportion of blacks and other minorities that was most frequently cited as indicating or defining housing integration was 40 to 50 percent. Between one-fifth and one-third of the respondents in practically every category—sex, age, income, education—designated this proportion.

(c) One-fifth of the sample said that there is a point at which there would be too many blacks and other minorities at Starrett City. In a rather consistent way the more mobile, relatively young, and middle-income household representatives were relatively more inclined to endorse this proposition.

(d) When those who said they think there is a point at which the percentage of blacks would be too high were asked to specify that point, nearly two-thirds indicated that if the percentage of black residents were above 40 percent, it would be too high.

(e) A very significant practical corollary of the respondents' strong support and preference for integrated housing is their perception that segregated housing is likely to be inferior housing; more than three-fourths (77%) of all household representatives thought that services would be worse if Starrett City were to become an all-black or predominantly black development.

Tipping Points and Decisions to Move

25. In contrast to the consensus about the importance of integrated housing, there was no consensus about whether Starrett City would remain integrated if management accepted tenants on a first-come, first-served basis. Our research concerning black residents' views on tipping and how they would decide whether to move revealed the following:

(a) The incidence of uncertainty is relatively high in all categories—that is, without regard to age, income, sex, or education; the evidence suggests, however, that the proportion of uncertain responses is highest among older respondents, respondents with lower income, and respondents who think management should not regulate tenant selection by race at all.

(b) At least one-third of all respondents said that they would definitely attempt to move if the black population at Starrett City rose to 30% or more of the development's total population.

(c) The younger, upwardly mobile, and more affluent household representatives tended to be relatively more firm not only in their support of race-conscious tenant selection, but also in their readiness to move if they perceived that the development's racially integrated character was seriously threatened or eliminated.

Are There Trade-Offs for Housing Integration?

26. An effort was made to ascertain:

(1) if black residents perceived possible trade-offs to racial integration in their views on housing—that is, if there are circumstances under which black residents would continue to live at Starrett City, even if they perceived it as not integrated; and

(2) the degree of preference that black tenants would give to an integrated residential community as compared with equally adequate housing in a segregated community.

27. Our findings with respect to these issues were as follows:

(a) A sizable minority of almost two in five (38%) of a subsample of 100 mentioned a variety of specific circumstances under which they would continue to live in Starrett City even if it were not integrated. Most of these circumstances involved the quality of life and feelings about neighbors. To a lesser extent, respondents mentioned eco-

nomic factors; some suggested, for example, that they might stay in a non-integrated project, if the rent were lower.

(b) An equally sizable minority (39%) of the subsample indicated uncertainty about whether there are any conditions under which they would stay at Starrett City if it were not integrated.

(c) Almost one in every four (23%) of a subsample of 100 replied that there are no circumstances under which they would consider continuing to live in Starrett City if the percentage of minorities exceeded their perception of the tipping point.

28. Based upon the responses summarized above, it is possible to say categorically that as a group the black residents of Starrett City plainly prefer an integrated residential community to equally adequate housing in a segregated community.

Residents' Views On How To Maintain an Integrated Community

29. Although a clear majority of blacks living at Starrett City express a preference for living in an integrated community, that preference is not always accompanied by a recognition and acceptance of the specific methods that may be required for achieving and maintaining housing integration.

30. For example, when black residents of Starrett City were asked what methods should be used to maintain Starrett City as an integrated community, a substantial number of them automatically rejected race-conscious tenant selection or quotas.

31. When the responses are analyzed, however, deep-seated conflicts and ambivalence are revealed. Thus, in response to the open-ended question, "What, if anything, should management do to keep Starrett City an integrated community?", only one out of five respondents (22.4%) said that management should control selection on the basis of race. Almost the same number (18.7%) said that they were not sure. However, when the wording of the question was made more specific, "Should manage-

ment regulate the selection of tenants by race in order to maintain Starrett City as an integrated community?", nearly half of the sample (45%) responded affirmatively. The wording of the question appears to have made a difference.

32. It is clear, moreover, that those who state that the tipping point is as high as 60% minority are unwilling to confront the fact that such a high percentage of minorities would produce white flight. And it is also clear that if the percentage of minorities did reach the tipping point, the first blacks to join the white exodus from Starrett City would be the upper-income, higher-educated blacks. The blacks remaining in the resulting segregated community would then be, for the most part, less educated and in the lower socioeconomic stratum.

33. Thus, in spite of the inconsistency and the ambivalence in the attitudes of black Starrett City residents with regard to the regulation of tenant selection by race, if Starrett City is to remain an integrated community, as most of its black residents wish, then management must take race into account in its rental practices.

The Benefits of Integration vs. The Effects of Segregation

34. The benefits to be derived from integrated living are well documented. Public services tend to be appreciably better in integrated communities than in all-black or minority neighborhoods. Crime rates tend to be lower in integrated communities, and schools in integrated communities tend to produce better educational results. Integrated neighborhoods lead to integrated schools, without busing, and minorities in integrated schools consistently achieve higher levels of academic performance than minorities in predominantly minority, or all-minority, schools.

35. Past experience with integrated communities that have become segregated minority communities shows that such transformations are often accompanied or followed by a noticeable deterioration in the quality of life, as measured by any of several criteria (including those mentioned in the preceding paragraph). Upwardly mobile blacks know the value of an inte-

grated neighborhood and tend to seek housing elsewhere when a neighborhood goes through racial transition. The result is racial and economic ghettoization; for the resegregated communities consist primarily of less educated, lower income blacks, who have a greater propensity for social instability. This is often reflected by increased violence and higher crime.

36. One cannot overstate the damaging effect of racial segregation on minority children. Such segregation imposes deep feelings of inferiority, robbing minority children of a sense of personal dignity and imposing upon them the need to develop techniques of self-protection in dealing with the larger, white community.

37. Just as the Supreme Court has recognized that "separate but equal" schools can never be truly equal, so segregated residential communities can never be the true equal of integrated communities and can never provide the benefits to be derived from a community in which persons of different racial and ethnic backgrounds live together in harmony and cooperation. I know of no social scientist who has argued that segregation serves any positive purpose, and, in my view, it would be a tragedy of the highest magnitude if this litigation were to lead to the destruction of one of the model integrated communities in the United States.

/s/ KENNETH B. CLARK

Kenneth Clark

Sworn to before me this
29th day of April, 1986.

/s/ IRWIN K. FINGERHUT

Notary Public

IRWIN K. FINGERIT
Notary Public, State of New York
No. 30-629380
Qualified in ?? County
Commission Expires March 30, 1988

Clark Exhibit A

CURRICULUM VITA

Kenneth B. Clark
60 East 86th Street
New York, NY 10028

Birth:	Panama Canal Zone, 24 July 1914
Education:	BA, Howard University, Washington, D.C., 1935 MS, Howard University, Washington, D.C., 193? PhD in Psychology, Columbia University, New York City, 1940
Career:	Distinguished Professor of Psychology Emerit City College of the City University of New York Visiting professor at Columbia University; University of California, Berkeley; Harvard University, Cambridge
Honors:	Sigma Xi, Columbia University, 1940 Phi Beta Kappa Springarn Medal, 1961 Kurt Lewin Memorial Award, 1966 Signey Hillman Prize Book Award, 1965 College Board Medal for Distinguished Service in Education, 1980 Honorary degrees from several colleges and universities
Writings:	PREJUDICE AND YOUR CHILD, Beacon Press, 1952 DARK GHETTO, Harper & Row, 1965 NEGRO AMERICAN, co-ed. T. Parson, Beacon Press, 1966 RELEVANT WAR AGAINST POVERTY, co-author Jeannette Hopkins, Harper & Row, 1969

A POSSIBLE REALITY, Emerson Hall, 1972
PATHOS OF POWER, Harper & Row, 1974

Family: the late Dr. Mamie Phipps Clark, wife
Kate Clark Harris, daughter
Hilton B. Clark, son

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

84 Civ. 2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

STARRETT CITY ASSOCIATES, AFFIDAVIT STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF NASSAU)

OSCAR NEWMAN, being duly sworn, says:

Introduction

1. By professional training, I am an architect and city planner. In 1959, following the completion of a six-year course of study in architecture, engineering, and urban planning, I received the degree of Bachelor of Architecture from McGill University in Montreal. I am licensed as an architect in New York and three other states. I am also a member of the American Institute of Architects and the American Institute of Certified Planners. A copy of my curriculum vitae is attached to this affidavit as Exhibit A.

2. I have devoted my professional career to research and writing regarding publicly assisted housing developments and, in particular, the various factors affecting the health and stability of such developments. Initially, my work was performed

while I was a member of the faculty at various universities, including Washington University in St. Louis, Columbia University, and New York University. Since 1973, I have been President and Director of the Institute for Community Design Analysis, an independent not-for-profit New York corporation, which conducts research projects on the effects of designed environments on behavior. Most of the research projects and reports for which the Institute is best known were funded by agencies of the federal government (including the Department of Justice, the Department of Housing and Urban Development, and the National Science Foundation) or by state or municipal housing agencies. A list of some the Institute's projects is included in my curriculum vitae.

3. The Institute for Community Design Analysis has had a longstanding commitment to fair housing and has undertaken research projects and prepared reports related to that subject. Most recently, the Institute has conceived, obtained funding for, and launched a major fair housing program that now serves eastern Queens and western Nassau County. The program seeks to open up housing to black families in 75 square miles of residential neighborhoods from which blacks have been systematically excluded. The program identifies the housing available in various price and rental ranges; reaches out to black families, through newspaper advertising and presentations to groups, to make them aware of the housing opportunities available to them; counsels the black families on financing and mortgaging; works with realtors and testers to insure fairness for black homeseekers; provides a network of community support to the black families moving into these neighborhoods; and provides second mortgage supplementary funds to the black families where they are needed. The Institute obtained a one and a half million dollar commitment from a private foundation to fund this fair housing effort for its first five years of operation, and I serve as the Chairman of its Board of Directors.

4. In February 1983, I was retained by the Starrett defendants in *Arthur* v. *Starrett City Associates*, 79 Civ. 3096 (EDNY), to provide expert assistance, research, and testimony

regarding several subjects, including methods of achieving and maintaining integration in housing, problems likely to be encountered in such efforts, possible explanations for these problems, and the so-called "tipping" phenomenon. I performed a variety of tasks during my work in *Arthur*. Among other things, I reviewed the scholarly literature on housing integration and "tipping," visited Starrett City several times and spoke with Starrett personnel, interviewed a large number of persons with substantial experience in publicly assisted housing (including private housing developers as well as officials of the New York City Housing Authority, the New York State Division of Housing and Community Renewal, and other government housing agencies), and researched the history and current conditions of several publicly assisted housing developments near Starrett City as well as two large housing developments within five and a half miles of Starrett City, Lefrak City and Rochdale Village.

5. As an outgrowth of my work in *Arthur*, I prepared a lengthy report entitled *Integration Equals Intervention: The Use of Occupancy Controls at Starrett City*. I understand that a copy of this report was made available to counsel for the federal government prior to the filing of the government's complaint in this action. A copy of my report is attached to this affidavit as Exhibit B.

6. Subsequently, I prepared several supplemental reports, two of which, entitled "A Comparison of Crime in Starrett City with Other Housing Developments," and "Twenty Years of Social Change in East New York and Environs, 1964–1984," are attached as Exhibits C and D, respectively.

7. I have reviewed the complaint and answer in this action as well as the government's motion for summary judgment. In this affidavit, I review and summarize the results of my research that appear to have particular bearing on the government's motion.

Social and Economic Factors Relevant to Housing Integration

8. In my view, a principal flaw in the government's position is that it is overly simplistic. The government attributes the difficulties in achieving and maintaining integration at a development like Starrett City solely to racial prejudice. In reality, housing integration poses very complicated problems, which involve, and are affected by, many different factors. Prejudice no doubt plays a role, but it is by no means the exclusive relevant consideration.

9. The difficulties in achieving and maintaining integration in large, urban, publicly assisted housing developments are related to a variety of social and economic conditions, some of which themselves may be traceable in part, through a complicated chain of causation, to past and present racial prejudice. In the paragraphs that follow, I present some of the social and economic data that I regard as relevant to the problem of housing integration. Although definitive, verifiable conclusions about the causes of social behavior are difficult to draw, I firmly believe that many of the difficulties encountered in achieving and maintaining housing integration in urban areas are related to social and economic factors of the kind I mention here and are not simply the sole consequence of racial prejudice.

Urban Concentration

10. First, the black population in the United States is more urban than the white population. According to the Bureau of the Census, blacks formed 11.7% of the U.S. population in 1980. 75.9% of blacks, but only 58.5% of whites, live inside urbanized areas. Moreover, 75.4% of the blacks living inside urbanized areas lived in central cities; only 42.1% of whites living inside urbanized areas lived in central cities.

Family Structure

11. In 1960, 20.7% of black families with children under 18 years of age were headed by women. Twenty-two years later, in

1982, more than twice that percentage (46.5%) of black families were headed by women. This constitutes almost half of all black families with children. The comparable figure for white families with children under 18 years of age headed by a female was 15.0% in 1982 (Bureau of the Census). In 1981, 56.0% of black babies were born to unwed mothers, in comparison with 11.6% of white babies.

12. According to figures compiled by the Children's Defense Fund, a child advocacy group based in Washington, more than 25% of blacks born in 1979 were born to teenage mothers. The comparable figure for whites was approximately 14%.

13. A 1983 report by the Center for the Study of Social Policy, a nonpartisan research group, showed that in all races, families headed by a woman were twice as likely as two-parent families to have incomes below the federally defined "poverty level." Half of all families headed by black women have incomes below the poverty level.

Income

14. The average income for all black families with children is 56% of the average for white families with children. Black families with two working partners do better, earning 84% of the income of white families with two working parents, but, as noted above, almost half of all black families are headed by a female (Bureau of the Census).

Education

15. In 1978, 52.4% of blacks had completed less than the 12th grade. The comparable figure for whites was 32.1%. The recently completed national assessment of educational progress conducted by the Educational Testing Service in Princeton shows that, although there has been significant convergence since 1971, black and Hispanic performance still lags far behind white performance—about three grade levels behind by the end of high school (*Reading Report Card 1971-84*, Princeton, 1985).

Employment

16. The unemployment rate among blacks is significantly higher than the unemployment rate among whites, and the problem is particularly acute among black teenagers. The official unemployment rate for black teenagers hovers around 50 percent, but that figure may be misleadingly low. According to Sar A. Levitan, an employment analyst, only one-sixth of black teenagers actually have jobs (*New York Times*, November 20, 1983). In Levitan's view, official figures probably understate the unemployment rate among black teenagers, because so many black teenagers have dropped out of, or never joined, the labor force.

Crime

17. The F.B.I. Uniform Crime Reports for 1980 show that, although blacks form only 11.7% of the U.S. population, they account for 24.5% of those arrested for all offenses and 44.1% of those arrested for violent crimes. Blacks account for 47.9% of all persons arrested for murder in the U.S., 47.7% of those arrested for forcible rape, and 57.7% of those arrested for robbery. Blacks also account for 29.9% of all persons arrested for property crimes; 29.1% of those arrested for burglary; 30.5% of those arrested for larceny theft; and 29.4% of those arrested for motor vehicle theft (Grand Larceny Auto).

Property Values

18. Most neighborhoods that become predominantly black experience either a decline in property values or a failure of such values to keep pace with an overall increase in property values throughout a larger geographical area. Typically, there is an initial increase in residential property values as blacks move into a predominantly white neighborhood. This increase is attributable to the fact that blacks, having fewer housing options available to them, will often pay more for a property than whites, whose choices are more numerous. As the neighborhood becomes predominantly black, however, property values ordinarily decline or increase more slowly than the community

average. (See J.S. Fuerst, *Real Estate Issues*, Winter 1982, "Race and Property Values.")

19. In my interviews of housing developers and managers, I found a widespread belief that the resale value of assisted housing developments ordinarily declines in rough proportion to the increase in percent black occupancy.

Neighborhood Conditions

20. Residents of segregated minority communities commonly receive inferior municipal services. Such communities may not even have paved streets or street lighting. See, *e.g.*, *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972).

21. Although glaring disparities of service are rare in most large municipalities, noticeable differences do exist. The Bureau of the Census and the Department of Housing and Urban Development together perform an Annual Housing Survey of housing and neighborhood conditions in large cities. The following paragraphs, based on information from the 1976 Annual Housing Survey by the Census Bureau and HUD compare black and non-black evaluations of neighborhood conditions and services within New York City.

22. The data indicate that although black households are, overall, only slightly more subject to undesirable neighborhood conditions (89.1% v. 86.3%), in certain categories the disparity is fairly significant, including:

Abandoned buildings	38.5% v. 14.2%
Run-down housing	33.1% v. 14.1%
Poor street lighting	18.4% v. 11.0%
Crime	52.4% v. 43.5%
Litter	43.9% v. 29.2%

23. Forty percent of the black households, but only 31.1% of non-blacks, reported one or more inadequate services.

24. Only 32.6% of the black households rated their neighborhood as "good" or "excellent". The comparable figure for

non-blacks was 59.6%. Also, 18.6% of the blacks gave an overall opinion of "poor"; only 8.2% of the non-blacks gave such an opinion.

Neighborhood Abandonment

25. When inner-city communities become both poor and predominantly black, it is often a prelude to gradual abandonment. This has been my observation in New York City, St. Louis, Chicago, Detroit, and Cleveland. Examining the situation in the urban area involved in this case, I found that those residential neighborhoods around Starrett City that had become more than 50% black also experienced a serious loss in total population. Thus, East New York, which was 70% black in 1970, lost 33,000 people, or 36% of its population, by 1980. And Brownsville, which was 72% black in 1970, lost 35.5% of its population, or 25,000 people, by 1980.

Extent of Integration

26. A leading study of the extent of housing integration in the United States is that performed in 1983 by Prof. Karl Taeuber of the University of Wisconsin. (*Racial Residential Segregation*, Washington, D.C., Center for National Policy Review.) Using data from the 1980 census, data collected 12 years after the passage of the Fair Housing Act, Prof. Taeuber examined 28 cities with a black population of 100,000 or more. These cities together housed 9.7 million blacks, approximately one-third of the nation's total. Taeuber measured the levels of housing integration in these cities on the basis of an index in which 100 represents total segregation (that is, every city block is either 100% or 0% black), and 0 represents total integration (that is, every city block has the same ratio of blacks in it as in the city as a whole).

27. Taeuber found that the nation's 1980 segregation index was 81, down only six points from 1970. This decline of six points during the 1970's was identical to the decline in the previous decade. Thus, the passage of the Fair Housing Act in 1968 did not produce any immediate acceleration of the pace of inte-

gration. If the same rate of change continues, Taeuber concluded, it will take 50 years just to achieve an index of 50, that is, to produce a situation in which 50% of city blocks have blacks living in them at the same ratio as their presence in the city as a whole.

The "Tipping" Phenomenon

General Background

28. I am persuaded that the numerous social and economic disparities between blacks and whites, some of which I have outlined in the preceding section, contribute greatly to the difficulties that have been encountered in achieving and maintaining meaningful, stable housing integration. In particular, I believe they help to explain the phenomenon of "tipping," which has been much discussed in the social science literature.

29. "Tipping" refers to the rapid racial transition of a community or housing development from an integrated population to a predominantly black population. The notion is that, once a community or a housing development reaches a certain percentage of black occupancy, transition to a predominantly black population is likely to be not only unavoidable but also quite rapid. The level of black occupancy at which this effect is likely to occur is called the "tipping point."

30. Some commentators define the tipping point as that level of black occupancy at which white move-outs accelerate. (Goering, John M., "Neighborhood Tipping and Racial Transition," *AIP Journal*, Jan. 1978.) Other criteria by which the tipping point might be defined include a decline in the rate at which whites apply for housing or a decline in the willingness of white applicants to replace departing white residents. (Farley, R., *et al.*, "Chocolate City, Vanilla Suburbs," *Social Science Research*, 1978.)

31. The tipping point is a quantity that is difficult to predict with precision. It has been variously estimated, in different factual contexts, as ranging from a low of 1% black (Rapkin, C., and W.G. Grisby, *The Demand for Housing in Racially Mixed*

Neighborhoods, Berkeley, Univ. of Cal. Press, 1960), to a high of 60% black (Navasky, V.S., "The Benevolent Housing Quota," *Howard Law Journal*, 1960). The tipping point varies from location to location, and depends on many factors, including the size of the housing development and the racial characteristics of its surroundings. Thus, for example, a small assisted housing development (of 12 to 20 homes) located in an all-white middle-income community, might reach 60% black occupancy and remain stable. This is because the white and black residents of such a small development would be surrounded by the middle-income community and would see themselves as part of this greater whole. But this would be very unlikely to occur in a large development of several hundred subsidized units, particularly one located in a minority community.

32. Most social scientists and housing experts agree that under normal circumstances tipping begins to occur at between 10% and 20% black occupancy. (One should distinguish between "black" and "minority" occupancy. As commonly used, "minority" includes all racial groups other than whites, as well as persons of Hispanic ethnic background. My interviews with housing managers and my examination of New York City Housing Authority data strongly suggest that the percent black (including Hispanic blacks) is the single most important factor that predicts tipping. In a city like New York, where non-black minorities make up a substantial portion of the population, the total minority occupancy may also be a relevant consideration.)

33. As I have said, the tipping point for a particular housing development, depending as it does on numerous factors and the uncertainties of human behavior, is difficult to predict with precision. It is essential, however, if one wishes to preserve an integrated environment, to avoid erring on the high side. If one predicts a tipping point higher than what it proves to be, tipping may begin to occur inadvertently. Experience shows that it will then be extremely difficult, if not impossible, to avoid a rapid transition to a segregated minority development. Bringing such communities back to an integrated status is a rare occurrence indeed, and requires extraordinary measures (see my discussion

of Kew Gardens Hills, at pages 170-180 of *Integration = Intervention*, attached as Exhibit B).

The Situation at Starrett City

34. Based on my research and my familiarity with the circumstances at Starrett City, I can identify a number of factors that I believe are relevant to an accurate estimation of Starrett City's tipping point. Among these factors are:

(a) *Starrett City's size.* The development is a community in itself, with its own shopping center, schools, medical center, recreational facilities, and police force.

(b) *Starrett City's location.* Location is relevant in several respects. First, Starrett City was built on the edge of the East New York section of Brooklyn, one of New York City's worst slums and highest crime areas. Second, other physical factors of Starrett's site are or were unappealing; the development was built on the site of an old garbage dump, near automobile junkyards, and on a heavily used flight path to Kennedy Airport. Third, Starrett City is located approximately 12 miles from Manhattan, and available public transportation facilities require a lengthy commute for persons who work in Manhattan and live at Starrett City.

(c) *The income level of Starrett City's residents.* The incomes of persons living at Starrett City are subject to several limitations imposed by the federal government. First, as a consequence of Starrett City's participation in HUD's Section 236 program, the income ceilings established by the federal government under Section 236 are applicable to all of Starrett City's apartments. In addition, Starrett City residents for whom Starrett receives direct federal rental subsidies under HUD's Section 8 program are subject to even more stringent income limitations. This is particularly true for the residents of those Section 8 apartments that must be rented to persons of Very Low Income, within the meaning of the federal government's guidelines. (These apartments make up 30% of the total

number of apartments for which Starrett City receives Section 8 subsidies.)

(d) *The size of Starrett City's apartments.* Many of Starrett City's apartments are two-bedroom or three-bedroom apartments. As a result, many families with children live at Starrett City, and the development houses a considerable number of teenagers.

(e) *The racial composition of Starrett City's waiting list.* The waiting list is predominantly minority. The statistics in the *Arthur* consent decree suggest that more than 50% of the waiting list is black, and that less than 25% of the list is white.

35. On the basis of these factors and others, I would be quite confident in concluding that, without occupancy controls, Starrett City's tipping point is at most 20% black, and probably considerably lower.

The Experience of Neighboring Projects

36. To provide additional data relevant to estimating the tipping point of Starrett City, I investigated several housing developments near Starrett City. These developments included all six public housing projects within a one-and-a-half mile radius of Starrett City, as well as a higher-income apartment development across the street from Starrett City, Fairfield Towers. I did not include in my study the nine public housing projects located in Brownsville, a neighborhood bordering East New York. These projects were already predominantly black at the time the Fair Housing Act was passed.

37. Of the six public housing projects within a mile and a half of Starrett City, four are in East New York (Linden Houses, Boulevard Houses, Pink Houses, and Breukelen Houses), and two are in Canarsie (Glenwood Houses and Bay View Houses). The average income of the residents of Linden Houses, Boulevard Houses, and the two Canarsie projects approximates the average income of Starrett City residents. Residents at the other two projects, Pink Houses and Breukelen

Houses, have average incomes substantially below the average income of Starrett City residents. The average income of the residents of Fairfield Towers is approximately 70% higher than the average income of Starrett City residents.

38. The graph reproduced on the next page, which is based on data that I have obtained from the New York City Housing Authority ("NYCHA") and the management of Fairfield Towers, shows the percent of black occupancy of these seven housing developments over time. As the graph shows, in the four years before enactment of the Fair Housing Act, all seven housing developments, with the exception of Breukelen Houses, had approximately 10 to 15 percent of their units occupied by blacks.

INCREASE IN % BLACK UNITS IN HOUSING BORDERING S.C.

Graph is being submitted to the court as a lodging contemporaneously with this petition.

39. By mid-1968, Linden Houses, Boulevard Houses, and Pink Houses were all approximately 15% to 17% black. After the enactment of the Fair Housing Act in 1968, the NYCHA made no effort to control the minority occupancy of these projects. From that time forward, the projects' black occupancy rates increased dramatically, so that by 1980 all three developments were more than 80% black. The racial transition at Fairfield Towers, a higher-income development, was even more rapid. In 1972, Fairfield Towers was still only 17% black. Within the next five years, Fairfield Towers became 90% black, and by 1981, it was 97% black. One possible explanation for the speed of the racial transition at Fairfield Towers is that the residents of that development, having higher incomes than the residents of the public housing projects, found it easier to obtain alternative housing once the development began to tip.

40. Unlike the other six developments included in the graph above, all of which consist of buildings six stories high or higher, Breukelen Houses includes a high percentage of three-story walk-ups. This physical design feature has been shown to have a favorable effect on project stability and to reduce the rate of racial change. (*Factors Influencing Crime and Instability in Urban Housing Developments*, Newman, 0. and Karen Franck, National Institute of Justice, G.P.0. Washington, D.C. 1980.) Breukelen Houses was already 35% black in 1964. By 1982, Breukelen Houses was approximately 77.6% black. Its rate of transition was slower than that of its neighboring high-rises.

41. By contrast to Fairfield Towers and the three public housing projects that changed dramatically in racial composition during the 1970's, Bay View Houses and Glenwood Houses, the two Canarsie projects, have not changed greatly. They were approximately 10% black in 1964 and they were 16% to 18% black in 1982. Of course, the racial composition of Canarsie is different from that of East New York. But that is not the full explanation. A comparison of 1970 and 1980 census figures for the neighborhood surrounding the projects that tipped, including Fairfield Towers, shows that the changes in those projects far outstripped the changes in the neighborhood

as a whole. The projects' tipping probably contributed to the changes in the neighborhood's population, not vice versa (see "Twenty Years Of Social Change in East New York and Environs, 1964–1984," attached as Exhibit D, at 11).

42. The stability of Bay View Houses and Glenwood Houses is due, in my view, to the fact that they have never been allowed to reach their tipping points. Given the very high demand by blacks for NYCHA apartments, I strongly suspect that the NYCHA has deliberately maintained the black population at the two projects at below 20%, rather than renting on a first-come, first-served basis.

43. A further aspect of the tipping phenomenon deserves mention. It helps to explain why, when housing developments do tip, they do not generally become 100% black or minority. The reason is that the white residents who remain are most often low-income elderly persons who cannot afford alternative housing and therefore must stay in the developments, even after racial change. When Linden Houses, Boulevard Houses, and Pink Houses were 80% white, approximately 20% of the white families were elderly. By the time the projects became 50% minority, the percentage of white families who were elderly had risen to between 45% and 65%. The elderly residents had lower average incomes than white residents generally. (NYCHA Annual Data Reports.)

44. Based on the experience at Fairfield Towers, Linden Houses, Boulevard Houses, and Pink Houses, together with my other research concerning tipping, I am convinced that the tipping point for Starrett City, in the absence of occupancy controls based on race, would be somewhere between 15% and 20% black. Prior to the consent decree in *Arthur*, approximately 21% of Starrett City units were occupied by blacks, and a total of approximately 36% were occupied by blacks and other minorities. As a result of the consent decree in *Arthur*, the percentage of Starrett City's units rented to blacks will increase to approximately 23%, and the total percentage rented to minorities will increase to approximately 39%. It is my firm conviction that this high level of stable, minority occupancy is only

possible because Starrett City takes race into account in selecting its tenants and because existing tenants and new applicants know of Starrett City's commitment to maintaining integration through the use of occupancy controls. This removes the uncertainty about what the future may bring regarding tipping. Occupancy controls, in other words, allow a higher level of black participation in a stably integrated setting.

45. Given the racial composition of Starrett City's waiting list, and the dramatic examples of tipping of neighborhood projects shown on the graph above, I think it is beyond question that, in the absence of effective occupancy controls, Starrett City would become an overwhelming minority development within a very short period of time. I would estimate that, if this Court orders Starrett City to rent its apartments without taking race into account, Starrett City will become at least 80% minority within three to five years. Moreover, the publicity that inevitably would attend such a decision by this Court would discourage white applicants from moving into Starrett City and potential white applicants from filing applications. In that event, the transition to a segregated, minority development might occur even faster.

My Interviews with Housing Professionals

46. My conclusions about the need for active intervention by management to maintain integration at Starrett City have been confirmed by a series of interviews that I conducted with 30 prominent housing developers, managers, and public officials, in New York City and elsewhere in the United States, who have had substantial experience with efforts to create and maintain integrated housing. The testimony of these persons was surprisingly uniform. There was clear consensus on the following points:

(a) The creation of an integrated housing project requires setting realistic goals for white, black, and other minority participation in the project.

(b) Even with the use of occupancy controls based on race, such goals ordinarily cannot be set above 40% mi-

nority and 20% black, without creating an unacceptable risk of tipping.

(c) Integration goals for a housing development should be set with community participation and approval, and with the understanding and approval of participating state and local housing agencies.

(d) At no point during the initial rent-up process should the percentage of rented apartments occupied by blacks or minorities be permitted to exceed the percentage goals for black or minority occupancy set for the project as a whole. If the percentage of black or minority occupants is permitted to exceed the prescribed percentage early in the rent-up process, it will prove even more difficult, if not impossible, ever to achieve the desired racial mix.

(e) In urban projects, particularly those located near minority areas, large numbers of minority applicants can be expected. When the applicant pool is predominantly or overwhelmingly minority, the only way to achieve integration is to delay renting apartments until the development has attracted a sufficient number of non-minority applicants to permit rentals to proceed on an intregrated basis from the outset.

(f) If a project is located immediately adjacent to a depressed, predominantly black area, full rent-up can take a long time (probably more than 18 months), and management and its financing agencies should be forewarned of the likely cost of maintaining a high number of vacant apartments in order to achieve the desired occupancy mix.

47. Many of the developers, managers, and public officials whom I interviewed noted that the residents of integrated projects, both black and white, frequently expressed their preference for living in an integrated setting and their approval of the use of occupancy controls to ensure that integration is preserved.

48. Most of the persons whom I interviewed thought that controlled occupancy based on race is essential to the mainte-

nance of stable integration in any of the following circumstances: (a) where minority group demand is perceived as very high (sufficient to fill more than 40% of the project); or (b) where government subsidy programs allow for a high percentage (more than 10%) of heavily subsidized tenants or welfare recipients; or (c) where minority group participation is intended to be above 25%. All three of these circumstances are present at Starrett City.

49. Many of the persons I interviewed observed that the successful use of occupancy controls to achieve and maintain integration would probably have the salutary effect of encouraging the development of more integrated housing. In the political arena, successfully integrated housing developments will help to attract the support of voters and public officials for more such projects, and, as a matter of practical economics, the availability of occupancy controls to ensure stable integration is likely to act as an incentive for those housing developers who seek long-term investments and are committed to managing their own projects.

50. Several of the housing professionals with whom I spoke also stated that, by publicly acknowledging their commitment to occupancy controls as a tool of preserving integration, state and local housing agencies and the developers and managers of housing projects can achieve and maintain higher levels of minority occupancy, without tipping, than would otherwise be possible. By making the nature of their intervention known, housing officials, developers, and managers can help to allay fears and rumors that might otherwise contribute to loss of a development's integrated status. I believe that this factor has been very much at work in enabling Starrett City to achieve a stably integrated tenant population that was 45% minority, according to the 1980 census.

The Political Consequences of Segregation in Subsidized Housing Developments

51. One of the likely consequences if subsidized housing developments like Starrett City repeatedly become virtually all-

minority is a substantial erosion of political support for such developments. If the large expenditure of public funds involved at a development like Starrett City is seen to benefit only a minority segment of the community, it may prove very difficult to attract the level of political support necessary to produce more subsidized housing. That is particularly so if, in addition, segregated minority housing developments are viewed as having a destabilizing effect on surrounding neighborhoods.

52. There is evidence that the phenomenon I have described in the preceding paragraph—an erosion of public support for assisted housing, as the percentage of black occupants in such housing increases—has already occurred to some extent in New York City and State. The graph reproduced on the next page shows the increase in the percentage of black residents at the NYCHA's subsidized housing projects and, for the same time period, the changes in voting, by New York City voters and voters in upstate New York, on housing bond referenda. The trend is unmistakable. As the black occupancy of publicly funded housing projects increased, the level of voter opposition to further public expenditures for such projects also increased. Indeed, after 1960, when the percentage of black occupancy in NYCHA projects reached 40%, no housing bond referendum was ever again approved. Although the upstate opposition to such measures was always high, it was the virtual doubling of the New York City "No"-vote that defeated the housing referenda proposed after 1960.

INCREASE IN NY CITY'S AND NY STATE'S "NO VOTE" FOR HOUSING ASSISTANCE PROGRAMS WITH THE INCREASE OF BLACKS IN NYCHA SUBSIDIZED PROJECTS

Graph is being submitted to the Court As a Lodging Contemporaneously with this petition.

53. As some of the housing professionals I interviewed suggested, the successful maintenance of stable, integrated developments breeds further opportunity: more sites become available in adjacent white communities; other developers perceive the advantages and stability of such investments; and legislators perceive the utility of housing subsidies as a means of serving both their white and their black constituents.

54. In practical political terms, then, the real choice may be either a drastically reduced quantity of new, quality housing for minorities or active intervention to maintain stable integration at a level of minority participation that is high enough to approximate the minority component in the relevant market and to provide more than token integration, but at the same time is not so high as to cause subsidized housing to be identified as minority housing. The intervention alternative seems to me clearly preferable, because it will lead, in my view, to an expansion of the real housing options available to minorities. It will thus create the potential for eliminating, or at least reducing, the disparities in housing opportunity that now produce such high numbers of minority applicants at integrated developments like Starrett City.

55. It is worth remembering, after all, that the black population in the United States is only approximately 11.7% of the total population. That percentage is obviously far lower than the black percentage of the population at Starrett City, and it is also lower than the likely tipping point of large housing developments in most urban neighborhoods. Accordingly, if there were an adequate stock of truly integrated housing, there would be no question about our ability to accommodate blacks in decent apartments without sacrificing the present or future benefits of integrated living. This strongly suggests that the most desirable strategy is one designed to encourage and facilitate the creation of more integrated housing.

56. Unfortunately, the government's lawsuit against Starrett City looks in precisely the opposite direction. The government would sacrifice the advantages of integration (including the encouragement and incentive that Starrett City's success provides

for public and private housing developers), merely to obtain the immediate benefit of a comparatively small number of additional minority apartments at Starrett City. In my view, that is a shortsighted and misguided approach, and one that does not serve the purposes underlying the Fair Housing Act. The proper approach, I submit, is the promotion of more Starrett Cities, not official action that threatens to segregate the one Starrett City that already exists.

Comparison of Starrett City with Developments that Have Experienced Racial Transition

Introduction

57. The benefits to be derived from integrated housing are by no means limited to intangible improvements in racial relations or long-term increases in political support for subsidized housing. The fact is that time and again the rapid transition of a racially integrated housing development to a segregated, minority development has been closely followed by a significant deterioration in the quality and safety of housing, as measured by any of several criteria. For the moment, at least, the precise causal explanation for these phenomena is not important. What is important is that substantial changes have frequently followed upon racial transition, and that those changes have affected the livability and economic value of both the developments themselves and their surrounding communities.

58. In an effort to demonstrate the kinds of social and economic changes that have often been associated with rapid shifts in the racial character of housing developments, I have undertaken a series of comparisons between Starrett City, on the one hand, and several Brooklyn and Queens housing projects that have experienced tipping, on the other. Included among the latter group were the five East New York developments already discussed (Fairfield Towers and the four New York City Housing Authority projects, Linden Houses, Boulevard Houses, Pink Houses, and Breukelen Houses), each of which has between 1,100 and 1,600 units, as well as two larger developments, Rochdale Village and Lefrak City, which are

approximately five miles from Starrett City but are comparable to Starrett City in size, having 5,860 and 4,642 units, respectively.

59. Rochdale Village is a cooperatively owned development, and its residents have an average income approximately 25% higher than the average income of tenants at Starrett City. The average income at Lefrak City is also higher than that at Starrett City, but the difference is smaller.

60. Like the five East New York housing developments included in the chart following Paragraph 38, Rochdale Village and Lefrak City experienced sharp racial transformation in the 1970's. By 1980, Lefrak City was 78% minority, and Rochdale Village was 89% minority. I have described the circumstances at these developments in more detail in my report *Integration = Intervention*, which is attached as Exhibit B (see pages 104-116 and 158-170).

61. I also included in my comparative review Linden Plaza, a moderate-income rental development of approximately 1,500 units located a little more than a mile from Starrett City on the Brooklyn-Queens border. Linden Plaza (not to be confused with the New York City Housing Authority project, Linden Houses) is distinguishable from the other projects I compared with Starrett City in that it has been predominantly minority since the beginning of its rent-up, in 1971. Nonetheless, Linden Plaza did experience a significant racial transformation in the mid-1970's.

62. As I explain in more detail in the report attached as Exhibit B (at pages 116-129), Linden Plaza became approximately 75%-80% minority during the first few months of its rent-up process, when the first 45% of the development's apartments were rented. Concern grew, both in the development itself and in the surrounding neighborhoods. Only a few months after moving in, a substantial number of middle-class residents, white and black, moved out. The occupancy level of the development fell. Management then intervened, working together with the supervising governmental agency, the New York City Department of Housing Preservation and Development. Ef-

forts to attract white tenants were intensified, and, for the remainder of the rent-up period, from the beginning of 1972 to mid-1973, the development was maintained at approximately 53%-58% minority. But that level of mixed racial occupancy did not last. Many white tenants did not renew their leases, and new white tenants did not move in. By October 1976, the development was 89% minority, and by mid-1980, the minority percentage had risen even further, to 93.5%.

63. Given this history, given Linden Plaza's proximity to Starrett City, and given the fact that the average income of Linden Plaza residents is approximately 60% *higher* than that of Starrett City residents, it seemed to me appropriate to include Linden Plaza in my comparison. I investigated the following subjects: crime, "skips" and evictions, school performance, and physical conditions. My findings in each of these areas follow.

Crime

64. Using data collected from the New York City Police Department, the NYCHA Police Department, and Starrett City's own security office, I was able to compare Starrett City's crime rate with the crime rates at the four NYCHA housing projects in East New York (as well as the two NYCHA projects in Canarsie, Glenwood Houses and Bay View Houses). I examined three kinds of crime for each project: burglary, robbery, and grand larceny auto (auto theft).

65. As I show in more detail in the report entitled "A Comparison of Crime in Starrett City with Other Housing Developments," which is attached as Exhibit C to this affidavit, the pattern that emerged from these comparisons is clear. Starrett City's crime rates are appreciably lower than the crime rates at all four neighboring NYCHA projects in East New York, including both the two projects where the residents' average income is comparable to that at Starrett City and the two projects where the average income is lower than that at Starrett City. (Starrett City's crime rates are only slightly higher than those at the two Canarsie projects, which have minority populations sig-

nificantly smaller than those at Starrett City, and are located in a lower-crime area generally. Their residents have average incomes comparable to the average income of Starrett City residents.)

66. To investigate the correlation between the racial transformation of the NYCHA projects in East New York and the crime rates at those projects, I examined each project's burglary rate for 1968, 1970, and 1978. I chose those three years because up until 1968, the projects were stably integrated, by 1970 they had begun to change significantly, and by 1978 they were overwhelmingly minority. I chose to examine the statistics for burglary because, among the crimes for which records are kept by the NYCHA Police Department, burglary is the most frequent.

67. As I show in detail in the report attached as Exhibit C, my research revealed that the burglary rate at the East New York projects increased proportionally with the increase in the percentage of minority residents. This was true without regard to variations in the average income of residents at each of the projects.

68. I also compared Starrett City's 1978 crime rates with the crime rates for Rochdale Village and Lefrak City in the same year. I chose 1978 both for reasons of data availability and because by 1978 the racial transformations of Rochdale Village and Lefrak City were nearly complete.

69. Starrett City's crime rates were significantly below those of either Rochdale Village or Lefrak City. Starrett City experienced no murders, rapes, or felonious assaults; Rochdale Village had 6 murders, 9 rapes, and 34 felonious assaults, and Lefrak City had 2 murders, 6 rapes, and 64 felonious assaults. Lefrak City had twice as many robberies as Starrett City, and Rochdale had four times as many. Both Lefrak City and Rochdale had almost five times as many burglaries as Starrett City. Rochdale had 20 times as many grand larcenies, and Lefrak had 17 times as many. Only in the area of grand larceny auto (auto theft) did Starrett City experience a higher rate than Lefrak City, but Starrett City's rate was still only half that at Rochdale. (The differences among the auto theft rates may be attrib-

utable, at least in part, to differences in the number of cars at each development relative to the size of the development.)

70. I also obtained and reviewed data regarding the robbery and burglary rates at Lefrak City and Starrett City in 1982. Lefrak City's crime rates remained substantially higher than Starrett City's. Moreover, it is clear that the differences cannot be explained as the consequence of differences in crime rates between the two police precincts in which the projects are located. In fact, a comparison of the two precincts points in just the opposite direction. In 1982, the precinct in which Starrett City is located had higher rates for both burglary (27% higher) and robbery (240% higher) than the precinct in which Lefrak City is located. Starrett City's lower crime rates thus seem even more noteworthy.

71. Finally, I compared Starrett City's 1982 robbery and burglary rates with the corresponding statistics for Fairfield Towers and Linden Plaza, the two rental projects near Starrett City that have overwhelmingly minority tenant populations with average annual incomes considerably higher than the average income at Starrett City. Starrett City's burglary rate was notably lower than the burglary rates at both Fairfield Towers and Linden Plaza. Starrett City's robbery rate, though slightly higher than Fairfield Towers', was only half that of Linden Plaza. Thus, in all comparisons but one, Starrett City fared better than its higher-income neighbors.

"Skips" and Evictions

72. From the management of Fairfield Towers, Linden Plaza, and Starrett City, I obtained data regarding the rate of tenant "skips" (moving away without paying overdue rent), evictions, and dispossess notices served in 1982. I also requested and obtained data reflecting the costs associated with the skips and evictions, both in repairs to the vacated apartments and in lost rentals.

73. Fairfield Towers' skip rate and eviction rate proved to be 404% higher than Starrett City's; Linden Plaza's was 36% higher than Starrett City's. The percentage of the rent roll that

skips and evictions cost Fairfield Towers was 443% greater than it was at Starrett City; the comparable percentage at Linden Plaza was 71% greater than at Starrett City. The rate of dispossess notices served was 218% higher at Fairfield Towers than it was at Starrett City; and it was 49% higher at Linden Plaza than at Starrett City.

74. Thus, under all these criteria, Starrett City fared substantially better than both Fairfield Towers and Linden Plaza, two developments in the same neighborhood as Starrett City whose residents have average incomes far above the average income at Starrett City.

School Performance

75. To assess the quality of school performance, I contacted the evaluation officers in Community School District #19, which serves Starrett City, Fairfield Towers, and Linden Plaza; and Community School District #28, which serves Rochdale Village. The reading and math scores from the city-wide tests given in April 1983 were available from District #19. Only the 1982 reading scores were available from District #28.

76. Comparing the performance of Starrett City's schools against the performance of the schools serving the other three developments averaged together, I found that:

—Starrett City's elementary school performed 44.8% better in reading and 37.6% better in math than the other schools; and

—Starrett City's intermediate school performed 53.4% better in reading and 54.5% better in math than the other schools.

77. Perhaps the most noteworthy comparison of school performance is one I discovered only recently when I reviewed data obtained from Frank Arricale, the Community Superintendent of Community School District #19, which serves Starrett City and the surrounding East New York neighborhood. For the year 1985, Mr. Arricale provided the reading and math test scores for black students at Public School 346, the elementary

school at Starrett City (26.8% black, 22.4% Hispanic, 39.9% white, and 10.9% other), and for black students at Public School 306, a socioeconomically similar elementary school a couple of blocks away from Starrett City (81.2% black, 18.2% Hispanic, 0.5% white, and 0.3% other). The data tell a remarkable story.

78. As the table below shows, the black students at Starrett City's integrated school have performed substantially better than the black students at the nearby segregated school under the supervision of the same Community School District.

Percent of Black Students Performing At or Above National Grade Levels in the Nationally Administered California Achievement Test

Grade	Reading Scores	Black Students at P.S. 346 (Starrett City)	Black Students at P.S. 306 (near Starrett City)
2		60.3	39.8
3		70.5	43.5
4		75.8	53.3
5		68.9	61.9
6		76.4	61.5
Total		70.0	52.5
	Math Scores		
2		65.1	64.4
3		81.4	65.7
4		82.2	58.8
5		62.1	56.0
6		64.8	62.5
Total		71.0	61.3

79. The data presented in the foregoing chart seem to me quite remarkable. They show both consistent and substantial differenees in achievement between two groups of young black students living in the same neighborhood. They strongly suggest

that it is not just the white and Oriental students at Starrett City who are raising the average performance level at Starrett City's schools but that the black students at Starrett City are also benefiting significantly from the integrated educational environment provided both in the schools and in the development as a whole.

Physical Conditions

80. I have attempted to compare the physical conditions at Starrett City with those that prevailed at the nearest developments of comparable size, Lefrak City and Rochdale Village, following the racial transformation of those two projects. Such comparisons are often the most difficult to document, but they may reflect most strongly a development's deterioration. In this affidavit, I merely summarize the conclusions that I have set forth in greater detail in the report attached to this affidavit as Exhibit B. The comparison photographs included in that report provide perhaps the most graphic illustration of the conditions that I summarize verbally here.

81. My overall conclusion is that the physical conditions at Starrett City are markedly superior to those at Lefrak City and Rochdale Village. The physical changes that occurred at Lefrak City and Rochdale Village in the 1970's were, in my view, nothing short of cataclysmic. To explain the basis for this conclusion, I consider in turn the building entries and interiors at the three developments, the grounds and outdoor facilities, and the shopping facilities at and near the developments.

Building entries and interiors

82. My twenty years of experience in evaluating assisted housing developments has taught me that one of the best indicators of deterioration in the overall quality of housing at a development is the condition of the common entry and exit doors to multi-family buildings. At Starrett City, I found the entry and exit doors to all buildings locked, and the locks, closing hardware, glass panels, and intercom systems and alarm intact and fully operable.

83. At Lefrak City and Rochdale Village, the front doors to most, if not all, buildings were ajar, their locking hardware was jammed or malfunctioning, and the intercom systems in the buildings were inoperable. More important still, in almost every building in both these developments I found the emergency exit doors either propped open, pulled from their hinges, or totally missing. As a result, the maintenance of security was impossible, and outsiders were effectively invited to hang out in the hallways and stairwells of the buildings.

84. As it almost invariably does in large urban housing developments, the lack of adequate security led quickly to other problems: excessive wear and tear on building interiors, harassment of residents, and crime (robbery, burglary, and vandalism). The stairwells at Rochdale Village and Lefrak City were universally covered with graffiti; the hoses from the emergency fire-fighting equipment were missing, and the brass hardware removed; many of the elevators were malfunctioning and stank of urine; and there was evidence of drug use in the stairwells and elevators.

85. In Lefrak City, the windows in the passageways leading to the emergency exits had been totally knocked out. The elevator lobby on the ground floor of each building had originally been designed with a length of curved floor-to-ceiling windows, but, as the character of the development changed in the 1970's, the windows were broken so often that management decided to replace the glass wall with brick and cement block. The aesthetic effects of this replacement were unpleasant, to say the least.

Grounds and outdoor facilities

86. The grounds at Starrett City are kept in excellent condition. The streets and areas around the buildings are clean and remarkably free of debris. The athletic facilities are in good repair, and the playing fields and other grassy areas are kept neatly mowed. Outdoor benches and bus stop shelters are fully serviceable. Graffiti is minimal. The situation at Rochdale Vil-

lage and Lefrak City is very different. There, the grounds show serious wear, abuse, and neglect.

87. The play and sitting areas at Rochdale Village (basketball courts, children's playground equipment, seating for the elderly) are only skeletal remnants of what they once were. Basketball hoops, where they are still present, hang rusted from only one support. The paved playing surface is pockmarked with holes. The accompanying benches have most of their planks missing. Panhandlers and winos sit around harassing passing residents.

88. The grounds of Rochdale Village also suffer in other ways. Areas designated for the pick-up of discarded furniture are littered with old mattresses, broken furniture, old refrigerators, and large old cardboard containers. Repeat visits to the development revealed that the same items frequently remain uncollected for extended periods of time.

89. The local public school serving Rochdale Village, P.S. 80, borders the development's property. On a visit to the school, I found that the chain-link fence separating the two properties had been ripped apart to provide access to the school playground. The grounds of the playground were heavily littered with garbage, beer cans, and wine bottles. Most of the wood slats on the benches had been removed, and the play equipment was in very poor condition.

90. In Lefrak City, the outdoor swimming pools that once served each building have all been closed. They are decaying from neglect. So is the play equipment, paving, and fencing around the play areas.

91. Several elderly residents, both white and black, at both Rochdale Village and Lefrak City, informed me that they can only sit out in the morning and they must come out together and return together for safety. I myself observed drug transactions occurring rather openly at both projects, even in the early afternoon.

92. Lefrak City is in even worse condition than Rochdale Village. My visit to the site in February 1984 left me with the

impression that Lefrak City has experienced more obvious deterioration than any of the other developments I visited, including the public housing projects in East New York near Starrett City. Conditions at Lefrak City are comparable to those at the public housing projects in Brownsville, which are perhaps the worst NYCHA projects in the entire city. My inspection of Lefrak City suggests that, if anything, conditions at the development have deteriorated even further since 1977-1978, when Advisory Services for Better Housing, Inc. ("ASBH"), an experienced housing consulting firm, issued a report describing many of the same problems that I witnessed at Lefrak City. (The ASBH report was prepared following a four-month study of the development, undertaken pursuant to an agreement with the New York City Commission on Human Rights and the Lefrak organization.)

Shopping facilities

93. Starrett City contains a major shopping facility, which serves much of the East New York community as well as Starrett City. The stores are of high quality, and business appears to be thriving. Moreover, the success and stability of Starrett City seem to have contributed to some measure of commercial redevelopment in the nearby areas of East New York.

94. By contrast, following the racial transition at Rochdale Village, the two shopping centers located at the development lost most of their prime tenants. One of the food stores at the development now survives only as a co-op. Other stores are occupied by marginal users (informal taxi companies, secondhand clothes shops, and discount outlets). About a quarter of the shops are boarded up. The shopping strip across the street from Rochdale Village has suffered an equivalent transition. Only shops with marginal operations remain open. Neighboring garages are filled with old automobiles that are being picked apart for spare parts.

95. With the racial transition at Lefrak City, many of the major stores, restaurants, and banks that served the surrounding middle-class community as well as the development have

left. The commercial strip that borders Lefrak City on three sides has become occupied by marginal stores. Shops change hands frequently, and commercial lots are for sale. Ordinarily, one would not expect such conditions in a commercial location immediately adjacent to a 4,600-unit, high-density, low-to-moderate income housing development in a good neighborhood just off the Long Island Expressway.

Conclusion

96. In sum, the principal flaw of the government's lawsuit is that it treats the issue in this case as an abstraction rather than a matter of flesh-and-blood reality for the people who live at or near Starrett City. The government's submission simply ignores the principal relevant facts that I have set forth in this affidavit:

(a) There exist today major social and economic differences between blacks and whites, which contribute significantly to the difficulty of achieving and maintaining integrated housing;

(b) Given the circumstances at Starrett City, the recent racial transformations of neighboring projects, and the experience with publicly assisted urban housing generally, it is quite clear that a race-neutral rental policy would quickly convert Starrett City into an overwhelmingly minority development; and

(c) There is ample reason to believe that the consequences of that conversion would not be favorable. Although the precise causal explanation for complex social phenomena is always difficult to identify, the data that I have presented on crime, skips and evictions, school performance, and the physical condition of housing suggest a strong correlation between a housing development's transition to segregated minority status and an overall decline in the quality of housing and services available at the development.

97. I think it important to stress that the current racial mix at Starrett City very closely reflects the racial mix of Starrett City's market area, the area from which Starrett City draws

most of its tenants. In the principal report that I prepared in *Arthur* (attached as Exhibit B), I reviewed several possible definitions of the Starrett City market area and concluded that, under any reasonable definition of the market, Starrett City's racial composition closely resembles that of the development's market area (see pages 189-191 and Addendum A). Minorities are thus not underepresented at Starrett City in comparison to the minority percentage of Starrett City's pool of potential applicants. Starrett City serves a tenant population that is broadly representative of the larger urban area in which the development is located.[1]

98. Because of the limited housing opportunities available to minorities elsewhere, due in large part to continued discrimination, the minority component of the waiting list at Starrett City far exceeds the minority representation in Starrett City's market

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1 I note that among the materials submitted by the government in support of its motion for summary judgment are certain excerpts from a publication prepared by Michael A. Stegman and entitled *Housing in New York: Study of a City, 1984*. I have reviewed these materials and the statistical information they contain.

The Stegman study is the most recent triennial survey of the rental housing market in New York City. Its principal purpose is to determine the number and character of housing units available for rent in New York City. The survey is a legislatively mandated tool designed to assist the periodic review of rent control in New York City.

In addition to providing information on the age, condition, and availability of housing, the survey purports to describe the racial characteristics of New York City's total population. The survey presents no information about the racial characteristics of the five individual boroughs or of sub-areas within those boroughs. But it is precisely this kind of information that is needed to determine the racial characteristics of the market area served by Starrett City. Citywide figures, even if accurate, are not enough.

The Stegman study sampled 18,882 housing units in a city with a total population of approximately 7,000,000 people. It is possible that the sample size was too small to provide reliable data about the racial characteristics of areas smaller than the city as a whole and that this is why such data were not included in the survey report. The 1980 Census, which sampled every household, provides racial data for each census tract and is therefore sufficiently detailed to allow an accurate evaluation and portrayal of the Starrett City market area. I know of no data source that can support a more up-to-date analysis of the market served by Starrett City.

area. Instead of attacking the discrimination that continues to push minorities to developments like Starrett City, where minority applicants are welcomed, the government has chosen to attack Starrett City. Instead of seeking to increase the number of neighborhoods and developments in which minorities can find realistic housing opportunities, the government has acted to concentrate as many minorities as possible at Starrett City. That would only serve to perpetuate the segregation that is at the root of many of the social and economic problems that Starrett City has been trying to help solve. It is bad policy and, in the view of at least one concerned non-lawyer, bad law.

/s/ OSCAR NEWMAN
Oscar Newman

Sworn to before me this
2 day of May, 1986

/s/ MARGARET T. ZANG
Notary Public

MARGARET T. ZANG
Notary Public State of New York
[illegible]
Commission [illegible] 87

K-101

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

84 Civ. 2793 (ERN)

UNITED STATES OF AMERICA,

Plaintiffs,

—v.—

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Defendants.

AFFIDAVIT

DR. JOHN M. GOERING, being duly sworn, deposes and says:

1. I am presently employed by the United States Department of Housing and Urban Development, Office of Policy Development and Research. My duties include directing research and evaluation activities for fair housing programs. In addition to conducting research, I have taught both graduate and undergraduate courses on urban change, housing, race, community and neighborhood dynamics. Exhibit 1 hereto, sets out my educational background, professional experience, and publications.

2. Among the articles I have published is one entitled "Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence," *Journal of the American Institute of Planners* (January 1978). A copy of the article is attached as Exhibit 2. In the paragraphs below, I summarize some of my findings and conclusions about the tipping phenomenon.

3. The tipping can be defined as the threshold after which there is generally rapid, irreversible acceleration in the rate of

white out-movement from a neighborhood. The social science evidence on the tipping phenomenon, such that exists, is methodologically limited and often impressionistic. There is, in fact, little available data with which to answer definitively the question of whether and which neighborhoods may "tip".

The tipping phenomenon, like most urban and racial transition forces, is extremely complex and, based on my research, is affected by many factors including the following:

a. Urban population growth and the demand for housing;

b. The amount, cost, and condition of the available alternative housing. This factor includes whether subsidies exist which may stimulate or promote housing choices;

c. Discriminatory housing practices which often promote the exodus of whites and hasten transition;

d. Neighborhood associations or organizations which may exert an influence on the rate of neighborhood racial change;

e. The type and cost of housing in the neighborhood. (for example, renters are often more likely to be tolerant of high proportions of nonwhite residents in an area but at the same time are also more likely to move more frequently than homeowners);

f. The presence of employment opportunites;

g. The degree of control of the housing by owners and/or managing agents and the attitude exhibited by management;

h. The proximity to neighborhoods already experiencing racial change;

i. The quality and the delivery of neighborhood services, including access to public transportation;

j. Personal satisfaction with the size and characteristics of the dwelling unit, the neighborhood and neighbors;

k. The financial status of families, which helps determine which families can move as well as which alternative housing and neighborhoods are affordable;

l. Prejudice or the degree of tolerance for interracial living. Tolerance for interracial living is likely to fluctuate

depending on the age, stage in life cycle, and socieconomic status of the majority and minority group and with previous experience with interracial living;

m. Future expectations about the future of the neighborhood, including the prospect of status decline; and

n. The "image" of a residential area as one in which racial tolerance or intolerance is practiced by most residents, housing managers, associations and local officials.

4. Based on my research and professional experience, I have concluded that there is at present no systematic study measuring the degree of influence of these varying factors on the decisions to stay in or leave a neighborhood in order to be able to pinpoint the precise contribution of each factor in predicting the rate or direction of racial transition.

5. I have also concluded that there is no a priori basis for predicting what will happen when a specific area begins to experience racial transition. By implication, then, there is no social science capacity to affirm the existence of a universally applicable proportion of white to nonwhite residents which constitutes a tipping point in a racially changing neighborhood or housing complex. All data and analysis to date suggest it is incorrect to postulate an iron law of demographic change as the key to the process of racial transition. Each of the variables that has been presented has the capacity to either speed up or slow down the process of white flight.

6. Additionally, there are too many historical, institutional, and demographic variables to consider to ever predict who would live where and in what proportions. Social science has no tools for predicting the social and demographic characteristics of urban neighborhoods over extended periods of time. To the extent someone attempts to make such a prediction, he/she will not be able to rely on social science for anything more than the assurance that nothing known says the rate and process of racial transition is inevitable, irreversible, or solely determined by demographic factors.

7. Social science research thus does not support the proposition that it is inevitable that if the minority population at Starrett City were to significantly increase that the rate of white departures would rapidly and irreversibly increase, with new white applicants declining sharply.

Moreover, given the present turnover rate (Starrett City Statement of Undisputed Facts, Nos. 2, 10 & 12) and even assuming that all the tenants who leave the development are white and that all the vacancies are filled with minorities, it still would take approximately 5 years or more for the development to approximate the racial composition of its tenant waiting list. One cannot predict with certainty what the various factors described above will look like at that time, or that the racial composition of Starrett City will necessarily be significantly different than the composition of its waiting list.

/s/ JOHN M. GOERING
John M. Goering

Sworn to and subscribed before me
on this 30th day of May, 1986.

/s/ BERNARD S. BANKS

My Commission Expires June 30, 1986

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No. 88-82

In the Supreme Court of the United States

OCTOBER TERM, 1988

STARRETT CITY ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether petitioners violated the Federal Fair Housing Act, 42 U.S.C. 3601 *et seq.*, by imposing a quota system to limit indefinitely the number of minority tenants at a large apartment complex.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 840 F.2d 1096. The opinion of the district court (Pet. App. F1-F21) is reported at 600 F. Supp. 668.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1988. On June 29, Justice Marshall granted an extension of time to and including July 15, 1988, within which to file the petition for a writ of certiorari. The petition was timely filed on July 15, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners operate Starrett City, an extensive apartment complex located on 153 acres in Brooklyn, New York. It consists of 46 high-rise buildings containing 5,881

rental units (Pet. App. A3). The complex also houses two public schools, a recreational and community center, and a shopping center (*id.* at K2, K30).

The site was originally intended as a development of cooperative apartments, but the United Housing Foundation (UHF) abandoned that project in 1971 (Pet. App. A3). The Starrett Housing Corporation agreed to take over the project and to assume UHF's mortgage loan from the State of New York and the debt reduction contract with the United States Department of Housing and Urban Development (HUD) on condition that the development be a rental, rather than a cooperative, project (*id.* at A3, F3). In response to the community fear that the project would be all-minority (*ibid.*), the New York City Board of Estimate approved a tax abatement only upon the developer's assurance that it intended to create an integrated community (*id.* at A3-A4).

b. From the time the rental office opened in 1973 (Pet. App. A3), petitioners have based tenant selection on race and national origin to achieve and maintain occupancy percentages by apartment unit of approximately 64% white, 22% black, 8% Hispanic, 4.5% Oriental, and 2% other minorities (*id.* at A4, F6-F8).[1]

---

[1] Applicants for apartments are sorted explicitly according to race. An applicant first completes a preliminary information card stating, among other things, his or her race and the size of the apartment sought. Those cards that pass preliminary screening based on income, employment, size of the apartment sought, and family size are placed in the active file, in which cards are segregated according to race and apartment size. Petitioners send applicants an acknowledgment letter stating that no apartments are available. Applicants then go through final processing, including income checks. When an apartment becomes available, it is offered to the first applicant in the final pool who is of the same race or national origin as the departing tenant (Pet. App. A4-A5).

This system for limiting minority tenants has continued notwithstanding a waiting list containing a far higher percentage of minority than white applicants. Thus, while blacks comprised 53.7% of the waiting list as of October 1985 and Hispanics made up 18%, they occupied only 20.8% and 7.9% respectively of the apartments (*id.* at A7). Meanwhile, whites occupied only 21.9% of the places on the waiting list, but occupied 64.7% of the apartments (*ibid.*). As a consequence, the quota system has required minorities seeking housing to wait a substantially longer period than whites. On average, for example, a black family can expect to wait ten times longer (20 months) for a two-bedroom apartment than a white family (2 months) (*id.* at F8).

2. a. In December 1979, a class of black plaintiffs filed suit against petitioners in the Eastern District of New York, alleging that petitioners' selection of tenants on the basis of race violated Title VIII of the Civil Rights Act of 1968, also known as the Federal Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and state law (Pet. App. A5). Plaintiffs sought an injunction prohibiting the use of racial quotas in the allocation of apartments. See *Arthur* v. *Starrett City Assocs.*, 98 F.R.D. 500 (E.D.N.Y. 1983).

The parties reached a settlement in May 1984 that was embodied in a consent decree approved on April 2, 1985 (Pet. App. I1-I25). Petitioners agreed to make 175 additional units available to blacks and Hispanics over a five-year period (*id.* at A5), and the state housing authority (a co-defendant) agreed to promote housing opportunities for minorities (*id.* at I3). The decree expressly left unresolved the legality of petitioners' race-based tenant selection (*ibid.*).

b. The United States filed this action on June 28, 1984, alleging that petitioners' practice of denying apartments to minorities on the basis of race and national origin

violated the Federal Fair Housing Act (Pet. App. A5). Specifically, the government alleged that Starrett City committed violations of Section 804(a)-(d) of the Act, 42 U.S.C. 3604 (a)-(d), by limiting the number of apartments available to blacks, forcing blacks to wait significantly longer than whites for apartments, preferring white applicants while limiting the numbers of minority applicants accepted, and falsely representing to minority applicants that no apartments were available (Pet. App. A5-A6). The United States filed a motion for summary judgment, seeking to enjoin petitioners' allocation of apartments on the basis of race and national origin (*id.* at A6). Petitioners also moved for summary judgment (*ibid.*).

The United States District Court for the Eastern District of New York granted the government's motion for summary judgment and enjoined petitioners from further use of racial quotas in renting apartments (Pet. App. F20-F21). The court found that petitioners' rental practices substantially decreased rental opportunities for blacks and Hispanics (*id.* at F8), and that the practice thus violated the plain prohibition of Title VIII against discrimination based on race or national origin (*id.* at F16-F18). The court explained that neither prior precedent nor the statute's legislative history "[could] lawfully be interpreted to mean that * * * black[s] and other minority applicants who are qualified cannot obtain available apartments on an equal basis with whites but must remain subject to the landlord's quota" (*id.* at F17). It therefore concluded that "[d]efendants, as private landlords, were not empowered to establish quotas limiting the number of apartments to be made available to eligible minority applicants" (*id.* at F20).[2]

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[2] The court also stated that "[d]efendants were not authorized [by the statute] to treat the so-called 'tipping' phenomenon"—whereby

3. The court of appeals affirmed the judgment of the district court, holding that "the racial quotas and related practices employed at Starrett City to maintain integration violate the antidiscrimination provisions of the [Fair Housing] Act" (Pet. App. A10).

The court determined that Congress had enacted a strict anti-discrimination provision that it expected would eventually end segregation in housing. Thus, "[w]hile quotas promote Title VIII's integration policy, they contravene its anti-discrimination policy, bringing the dual goals of the Act into conflict" (Pet. App. A11). The court also concluded that the Act's legislative history does not resolve this conflict (*ibid.*). The court then looked to an analogous anti-discrimination provision, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to guide its determination of whether Starrett City's race-conscious quota system was permissible under the Federal Fair Housing Act. The court concluded from this Court's Title VII cases that any such program must be limited in duration (Pet. App. A12), and that it must be based on some prior history of discrimination "within the entity seeking to employ [the program]" (*ibid.*). It also stated that "programs designed to maintain integration by limiting minority participation, such as ceiling quotas, are of doubtful validity" (*id.* at A13 (citation omitted)).

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too many minority tenants would cause white tenants to leave and the complex to become all minority—"as a basis for denying minority applicants the same rights white applicants enjoyed" (Pet. App. F19). However, the court additionally pointed out that petitioners' "tipping" rationale was undermined by their willingness to increase the minority quota "when it became necessary to avoid litigating the private *Arthur* lawsuit which threatened their unlawful rental practices" (*ibid.*).

The court found that application of these principles required invalidation of petitioners' use of ceiling quotas. It noted that the quotas had already operated for ten years, and that there was little prospect that petitioners would abandon the quotas in the near future because the threat of white flight was unlikely to abate (Pet. App. A13). Second, it found no suggestion of prior racial discrimination or racial imbalance adversely affecting whites within Starrett City (*ibid.*). Finally, because petitioners' quotas operated as a ceiling on minority access to Starrett City, the court found that "the impact of appellants' practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities" (*id.* at A14). The court concluded, in sum, that "Title VIII does not allow appellants to use rigid racial quotas of indefinite duration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them" (*id.* at A16).[3]

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with the decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

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[3] Judge Newman dissented, explaining that the Federal Fair Housing Act, enacted to combat segregation, should not be used to impede integration (Pet. App. A17-A28) and that the court was bound by *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), in which it found lawful under Title VIII a one-time, race-conscious allocation of rental units designed to promote integration (Pet. App. A27).

1. The issue raised by this case does not present an occasion for this Court to resolve a conflict with decisions of other courts of appeals or this Court, and the petition does not claim such a conflict exists. Indeed, the court of appeals' decision is the first to address the merits of the use of racial quotas that exclude minorities in order to maintain fixed racial percentages among tenants in an apartment complex.[4]

Nor, contrary to petitioners' suggestion (Pet. 11-12), is review required because of the pendency of numerous cases involving the same issue. We are aware of no similar cases pending in the courts of appeals and, as the petition indicates (*ibid.*), only two suits by the government challenging similar use of racial quotas to maintain integration are now pending in the district courts. Neither of these cases has been tried or decided. Accordingly, it is appropriate that this Court stay its hand.[5]

2. The court of appeals correctly held that Starrett City's use of rigid racial quotas over an indefinite period to

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[4] In *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (1973), the Second Circuit considered a challenge to a short-term, race-conscious allocation of apartments in an urban renewal project, and thus did not address the legality of an ongoing system of racial quotas to maintain integration. In any event, any intra-circuit conflict between *Otero* and the instant case does not warrant review by this Court.

[5] Contrary to petitioners' erroneous factual assertion (Pet. 5) that HUD has "[a]t all times" approved their use of racial quotas, the district court found that HUD "[s]trongly disavowed * * * Starrett's apparent assumption that HUD supported racially based tenant selection practices at Starrett City" (Pet. App. F16, quoting *United States* v. *Starrett City Assocs.*, 605 F. Supp. 262, 264 n.3 (E.D.N.Y. 1985)). Accordingly, the court of appeals' decision is not in conflict with the interpretation of the Federal Fair Housing Act by the agency charged with its administration.

maintain fixed percentages of minorities and whites at Starrett City discriminated against minorities in violation of the Federal Fair Housing Act.

a. Petitioners' conduct violates the plain language of 42 U.S.C. 3604(a)-(d) by making apartments unavailable to minorities on the basis of race, forcing minority applicants to wait significantly longer for apartments than whites, enforcing a policy that favors whites over minorities, and representing to minority applicants in acknowledgment letters that apartments are not available when they are. Indeed, petitioners concede (Pet. 8) that their practices violate the language of the Act, but contend that their denial of housing to blacks and Hispanics is justified because its purpose is not to force segregation, but to maintain integration by stemming "white flight." Petitioners therefore contend that an exception should be made to the Act's plain prohibition of discrimination when minorities are excluded from housing so that whites will not flee.

Such an exception, however, not only violates the plain statutory language,[6] but is directly at odds with the intent of Congress in passing the Act. Certainly Congress hoped to combat segregation, but it elected to do so by removing racial barriers—largely predicated on stereotypes concerning minorities—that prevented minorities from choosing

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[6] Of course, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). As Senator Mondale said, when asked about the meaning of the bill's declaration of policy: "Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean." 114 Cong. Rec. 4975 (1968).

freely where to live. The legislative history reveals Congress's belief that the gradual and inexorable breakdown of segregation could best be effected through measures that barred discrimination and insured minority persons' access to whatever housing they could afford. Thus, Senator Mondale, a principal sponsor of the legislation, stated (114 Cong. Rec. 3422 (1968)):[7]

> We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that. * * *
>
> * * * * *
>
> There will not be a great influx of all the Negroes in the ghettos into the suburbs—in fact, the laws of supply and demand will take care of who moves into what house in which neighborhood. There will, however, be the knowledge by Negroes that they are free—if they have the money and the desire—to move where they will; and there will be the knowledge by whites that the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns.

It is precisely that freedom—to live wherever income permits—that petitioners' use of quotas denies to blacks and Hispanics.[8]

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[7] Because Title VIII of the Civil Rights Act of 1968 was offered as a floor amendment, the legislative history consists primarily of statements from the floor of the Senate and House of Representatives.

[8] Supporters emphasized repeatedly that the Act was designed to allow blacks and others to exercise their freedom to live wherever they could afford. See, *e.g.*, 114 Cong. Rec. 2275 (1968) (remarks of Sen. Mondale) ("the laws of economics will determine who can buy a house. All that legislation such as this would do would be to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his

It is, therefore, the principle of nondiscrimination, and not the end result of integration, that Congress enacted when it passed the Federal Fair Housing Act. As Senator Brooke, another principal sponsor, stated, "America's future must lie in the successful integration of all our many minorities * * *. That future does not require imposed residential * * * integration; it does require the elimination of compulsory segregation in housing." 114 Cong. Rec. 2525 (1968). Elsewhere, Senator Brooke stressed that "[a]s people are educated and have the opportunity and the wherewithal to move, they ought to be able to move" (114 Cong. Rec. 2282-2283 (1968)), and described the purpose of the Act as "giving the opportunity for people to live where they want to live and where they can live" (*ibid.*). In sum, as Senator Mondale stated, the Act "prohibits any discrimination on account of race, whether it is black, white, or whatever color it is." 114 Cong. Rec. 4974 (1968). Thus, petitioners' contention that Congress intended to permit them to *limit* minority access to housing turns the Federal Fair Housing Act on its head.[9]

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race"); *id.* at 5830 (remarks of Sen. Mansfield) ("As I envision the bill, we are concerned with removing a barrier which presently exists in our society for some Americans to exercise the right to live where their means will permit"); *id.* at 9570 (remarks of Rep. Hanley) ("I am going to vote for this measure because I believe that every American citizen has the right * * * to move freely * * * and to find * * * a place to live which he can afford"); see also *id.* at 2279 (remarks of Sen. Brooke); *id.* at 2528 (remarks of Senator Tydings); *id.* at 2708 (remarks of Sen. Hart).

[9] Petitioners suggest that the Act does more than command individuals to refrain from discrimination, since it directs the Secretary of Housing and Urban Development to administer that agency's programs "in a manner affirmatively to further the policies" of the Act (42 U.S.C. 3608(e)(5)). In response, we note first of all that the directive applies only to the Secretary. Secondly, this assertion only begs the question of what "the policies" of the Act are. Whether or not 42 U.S.C. 3608(e)(5) requires more than nondiscrimination, it is difficult

b. To justify their discrimination against blacks and Hispanics, petitioners argue that they must appease whites who will refuse to live at Starrett City with too many minorities. Petitioners' argument that their apartment complex will "tip" if blacks and Hispanics are not excluded blatantly caters to white prejudice. This Court has consistently rejected appeals to racial prejudice, disguised as laudable general policy objectives, as a valid basis for racial discrimination. See *Buchanan* v. *Warley,* 245 U.S. 60 (1917); *Palmore* v. *Sidoti,* 466 U.S. 429 (1984). In fact, petitioners maintain that an influx of minority tenants is itself undesirable because, they predict, it will lead to increased crime rates, vandalism, graffiti, increased nonpayment of rent, and a decline in educational achievement (Pet. 3; Pet. App. K87–K100). This is precisely the type of stereotyped thinking that Congress intended to eliminate from housing decisions by enacting the Federal Fair Housing Act.

As is apparent from this justification, petitioners' policies are in no way analogous to race-conscious affirmative action plans that courts have sometimes upheld as a means to increase opportunities for actual victims of discrimination or for members of groups disadvantaged by discrimination. See, *e.g., Steelworkers* v. *Weber,* 443 U.S. 193 (1979) (exclusion of blacks from skilled jobs);

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to see how a goal of eliminating housing discrimination against minorities is affirmatively advanced by permitting discrimination against minorities. Thus, while some courts have suggested that 42 U.S.C. 3608(e)(5) imposes on HUD a duty to consider the racial impact of its funding decisions, none have held that the duty itself is a limitless license to engage in long-term and burdensome discrimination against blacks and Hispanics in contravention of the clear prohibitions of the Act and its legislative history. See, *e.g., Anderson* v. *City of Alpharetta,* 737 F.2d 1530 (11th Cir. 1984); *NAACP* v. *Secretary of Housing & Urban Development,* 817 F.2d 149 (1st Cir. 1987).

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) (exclusion of minorities from public contracts); *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987) (exclusion of women from position of road dispatcher). Indeed, petitioners' selection program is the very opposite of affirmative action, since their refusal to rent apartments to blacks and Hispanics further *disadvantages* traditional victims of discrimination. Rather than promote minority access to housing, they place a ceiling on minority opportunity. Petitioners reserve apartments for whites while turning away minority applicants, thereby " 'singl[ing] out those least well represented in the political process to bear the brunt of a benign program.' " *Fullilove* v. *Klutznick*, 448 U.S. at 519 (Marshall, J., concurring) (quoting *University of California Regents* v. *Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part)). Petitioners' discrimination against blacks and Hispanics in favor of whites is the very type of discrimination that Congress intended to eliminate by enacting the Federal Fair Housing Act. There can be no doubt that the widespread adoption of private quotas to maintain a racial mix deemed ideal or desirable would significantly restrict minorities' housing opportunities and thus subvert the Act's goal to remove all race-conscious restrictions limiting minorities' housing choices.

c. Even if petitioners' quota system could properly be characterized as an affirmative action plan, it would nevertheless fail to meet additional criteria developed under Title VII for acceptable race-conscious conduct. There is no question that the quotas here are not grounded on evidence of prior discrimination or a "conspicuous imbalance" that disfavors the quotas' beneficiaries. The quotas thus are not, in any sense, remedial.[10] See *Johnson*

[10] As the plurality of this Court stated in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 276 (1986), "[s]ocietal discrimination,

v. *Transportation Agency,* slip op. 12-13; *Steelworkers* v. *Weber,* 443 U.S. 193, 208-209 (1979). Moreover, petitioners' selection system is indefinite in duration, rigid in application, and severely burdensome to innocent individuals. The limitation on minority access to Starrett City apartments has been in effect continously for ten years and "no definite termination date for Starrett's quotas is perceivable" (Pet. App. A13). Thus, petitioners' quota system does not satisfy the very stringent requirements of temporal limitation, flexibility, and minimal impact on excluded individuals that this Court has announced in the Title VII context with regard to those rare cases where a remedial preference may be permissible. See *Johnson* v. *Transportation Agency,* slip op. 20-22; *Sheet Metal Workers* v. *EEOC,* 478 U.S. 421, 475-479 (1986). Similarly, petitioners acknowledge (Pet. 10-11) that the aim of these quotas is not to attain, but rather to *maintain* a particular racial composition—an objective this Court has repeatedly rejected as inconsistent with Title VII. See *Johnson,* slip op. 21-22; *Sheet Metal Workers,* 478 U.S. at 475, 478; *Steelworkers* v. *Weber,* 443 U.S. at 208.

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without more, is too amorphous a basis for imposing a racially classified remedy." See also *Fullilove* v. *Klutznick,* 448 U.S. 448, 497 (1979) (Powell, J., concurring) ("this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

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Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1988

No. 88-82

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The government argues that this case is not appropriate for certiorari.

We disagree.

In our view, this is the best possible vehicle, presented at the best possible time, for determining a critical question of law.

As to the vehicle: the case comes up on an uncontested record, presenting no factual dispute to muddy the clear legal issue.

As to timeliness: The government does not deny that the proper construction of the Fair Housing Act is of critical and urgent importance to our society. The government argues only

that review now by this Court would be premature because only one circuit court of appeals has wrestled with the issue.

No doubt a conflict between circuits is a hallowed basis for certiorari, *see* Sup. Ct. Rule 17.1(a). But the writ is equally appropriate when "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." See Rule 17.1(c).[1]

This latter test could have been written to describe this case. If the decision below is not reviewed and reversed *now* by this Court, the accomplishments of Starrett City will be lost, it will become another urban ghetto, and the hopes of more than 17,000 people to live in an integrated community will be destroyed. And, as we pointed out in our main brief (pp. 11-12), the same misery will beset communities all over the country where integration maintenance has worked.

For all of these threatened people, review now will scarcely be premature.

The government is indifferent to these human costs of the delay it seeks. We beseech of this Court a greater sensitivity.

Dated: October 21, 1988

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1 The odds are poor that the Congress will soon offer further guidance. The Fair Housing Act was extensively amended in the session just concluded, Pub. L. No. 100-430, 134 Cong. Rec. S10562 (daily ed. Aug. 2, 1988), but nothing was done on the issue here presented. Indeed, Rep. Hyde introduced an amendment to prohibit integration maintenance, but the proposal failed, 265-139, 134 Cong. Rec. H4902 (daily ed. June 29, 1988).

Respectfully submitted,

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STARRETT CITY ASSOCIATES, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STARRETT CITY TENANTS ASSOCIATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the race-conscious rental practices used to achieve and maintain integration at Starrett City violate the Fair Housing Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-82

STARRETT CITY ASSOCIATES, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STARRETT CITY TENANTS ASSOCIATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

The Starrett City Tenants Association is the principal organization representing the thousands of persons who actually live at Starrett City. The other *amici*, listed in the Appendix, are 29 other civic, religious, charitable, and social groups that operate in or near Starrett City and that include many Starrett City residents among their members.

Members of the Starrett City Tenants Association and the other *amicus* groups have an obvious and direct in-

terest in the rental practices employed at Starrett City. Those practices have enabled Starrett City to become and remain a healthy, integrated community. They have encouraged persons of diverse racial, ethnic, and religious backgrounds to live together and to take pride in their homes.

Starrett City's residents want to preserve the integrated character of their community. Many choose to live at Starrett City at least in part because of the development's commitment to integration. Now, the successful 15-year experiment at the nation's largest federally assisted housing development is in jeopardy. The government and the courts below threaten to transform Starrett City from an exemplary integrated community to a racially segregated housing project. The residents of Starrett City urge this Court to intervene before that happens.

Amici and their members know firsthand both the tangible and the intangible benefits of integrated housing. They can testify from experience that the goal of integration, to which Congress committed this nation in the Fair Housing Act, is a goal well worth pursuing. *Amici* ask this Court, therefore, to grant review in this case and to prevent the Fair Housing Act from being used to produce a result diametrically opposite from that which Congress hoped to achieve.[1]

REASONS FOR GRANTING THE PETITION

Review is warranted in this case because the question presented is extremely important. Whether a housing development, operating under state and federal supervision, may consider race in the renting of its apartments when necessary to achieve and maintain integration is an issue of obvious nationwide significance. On

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[1] The parties' letters of consent for the filing of this brief have been submitted to the Clerk of the Court.

several previous occasions, this Court has addressed the legality of race-conscious measures used to achieve certain social ends. *See, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (race-conscious medical school admissions); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979) (race-conscious collective bargaining agreement); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (race-conscious distribution of public works funds); *Local 28 of the Sheet Metal Workers Int'l Assoc.* v. *EEOC*, 478 U.S. 421 (1986) (race-conscious admission to union membership); *United States* v. *Paradise*, 107 S. Ct. 1053 (1987) (race-conscious job promotion practices). The permissibility of race-conscious rental practices needed for the creation and preservation of integrated housing is surely no less important.

A. Review Is Needed Because the Integration Goals of the Fair Housing Act Cannot Be Achieved Without the Consideration of Race.

Congress enacted the Fair Housing Act in 1968 for the express purpose of replacing segregated housing with "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968), quoted in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). The Act was intended "to attack the segregated neighborhood" and to show that "once and for all we have decided, as a nation, to live together, not separately." 114 Cong. Rec. 3134, 3422 (1968) (remarks of Sen. Mondale).

Notwithstanding the clear congressional purpose, progress toward the goal of integrated housing has been agonizingly slow. That fact should be readily apparent to anyone who drives through the residential neighborhoods of our nation's major cities. One need not rely entirely on such impressionistic evidence, however.

In his 1983 study, *Racial Residential Segregation, 28 Cities, 1970-1980* (Center for Demography and Ecology, University of Wisconsin-Madison), Prof. Karl Taeuber used 1980 census data—data collected 12 years after

enactment of the Fair Housing Act—to examine all 28 U.S. cities having a black population of 100,000 or more. Together, these cities housed nearly 10 million blacks, approximately one-third of the total U.S. black population. Taeuber measured the levels of housing integration in these cities on the basis of an index in which 100 represents total segregation (that is, every city block is either 100% or 0% black), and 0 represents total integration (that is, every city block has the same ratio of blacks in it as the city as a whole).

Prof. Taeuber found that the nation's 1980 segregation index was 81, down only 6 points from 1970. This decline of 6 points during the 1970's was identical to the decline in the previous decade. The Fair Housing Act did not produce any apparent acceleration of the pace of integration. If the same rate of change continues, Prof. Taeuber concluded, it will take 50 years just to achieve an index of 50, that is, to produce a situation in which 50% of city blocks have blacks living in them in the same proportion as the proportion of blacks in the city as a whole. Taeuber at 4-5; *see also* Pet. App. K-72 and K-73 (affidavit of Oscar Newman, discussing the Taeuber study).

A more recent study has confirmed Taeuber's findings. Based on detailed analyses of 1970 and 1980 census data for 60 standard Metropolitan Statistical Areas, including the 50 largest such areas in the United States, Professor Douglas S. Massey of the University of Chicago and Nancy A. Denton of the Population Research Center at the same school have concluded that, "despite recent declines in some metropolitan areas, the level of black segregation remains quite high, especially in cities where the majority of urban blacks live." *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980*, 52 Amer. Soc. Rev. 802, 817 (Dec. 1987). Indeed, Massey and Denton report, "there has been remarkably little change in the status quo since 1970." *Id.* at 823. The discouraging fact is that during the 1970's, "[d]espite the ad-

vent of fair housing legislation, more tolerant white racial attitudes, and a growing black middle class with income sufficient to promote residental mobility, the segregation of blacks in large cities hardly changed." *Ibid.*

Starrett City itself is but an example—a large and dramatic example, to be sure, but still just an example—of the pervasive problems encountered in the effort to implement our national commitment to integrated housing. There is no question that, if Starrett City had rented its apartments on a first-come, first-served basis, the development would have been a segregated minority development from the outset. That fact has never been contested. The development was built on the southern edge of the depressed, overwhelmingly minority neighborhood of East New York, in Brooklyn. When construction of the residential buildings began in 1972, approximately 50 prospective tenants per day visited an information center set up in a trailer at the northern end of the construction site. Ninety-nine percent of the several thousand people who visited the site in 1972 were from East New York and were black. When Starrett City was built, therefore, there were three, and only three, alternatives available to petitioners and the state and federal governments:

1. They could allow the development to become virtually all black;
2. They could consider race as a factor in the rental of apartments and produce an integrated tenant population; or
3. They could abandon plans to build subsidized housing at the Starrett City site.

Recognition of this reality is what led the New York State Division of Housing and Community Renewal and the federal Department of Housing and Urban Development, both of which have supervised Starrett City's ren-

tal practices from the outset, to join with Starrett City in adopting and implementing the very measures that the government now challenges. *See* Pet. App. K-3. If the integration goals of the Fair Housing Act were to be served, there was simply no alternative but to take race into account in the rental of Starrett City's apartments.

That remains true today, at Starrett City and in many other locations as well. Successful integration of subsidized housing requires active intervention by management, working in conjunction with federal, state, and local housing officials. It will not happen by accident. This proposition is amply supported by the extensive evidence marshalled by Starrett City in support of its cross-motion for summary judgment. *See, e.g.*, Pet. App. K-23 to K-29, K-75 to K-76, K-81 to K-83. As Judge Newman wrote in dissent in the court of appeals (Pet. App. A-27), that evidence "may well be sufficient to entitle [Starrett City] to summary judgment on this issue of continued need for a race-conscious rental policy to maintain integration."

In any event, for present purposes, Starrett City's point must be taken as given. The government has chosen to litigate this case on the assumption that a race-conscious rental policy *is in fact needed* to maintain integration at Starrett City. In the government's view, that does not matter. The government has sought and obtained summary judgment, claiming it is entitled to prevail regardless of the consequences at Starrett City and for integrated housing generally. The government's position is simply that race may not be considered for any reason, even if some consideration of race is needed to achieve the integration sought by the Fair Housing Act. In the government's view, the bare language of the Act must prevail over its unquestioned purpose. Review by this Court is needed to determine whether the integration goals of the Act must be sacrificed to an excessively literal reading of its language.

B. This Case Is Well-suited for Review in This Court, Because the Legal Issue Is Squarely And Openly Presented.

Starrett City has always been forthright about its commitment to integration. Far from denying its rental practices, Starrett City has acknowledged them openly. Starrett City has advertised itself as a model of integrated living, and it has candidly admitted its consideration of race as a factor in the rental of apartments. The district court record contains the following Request for Admission by the government and Response by petitioners (A00086):[2]

> *Request for Admission No. 54*
>
> The defendants, to further and maintain racial integration at Starrett City, openly control tenant selection on the basis of race.
>
> *Response*
>
> Starrett admits the matter stated in this request.

Although Starrett City's candor has made it an inviting target for litigation (both in the present case and in the private class action captioned *Arthur* v. *Starrett City Associates*, 79 Civ. 3096 (E.D.N.Y. filed Dec. 5, 1979)), the absence of any significant factual dispute about what Starrett City does in renting its apartments makes this a particularly suitable case for review. The issue presented in this case need not and should not be permitted to "percolate" any longer in the lower federal courts.

If the court of appeals' decision is permitted to stand, the few housing managers and housing officials who have been willing openly to advocate integration through the use of race-conscious rental practices may be forced

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[2] "A" refers to the joint appendix filed by the parties in the court of appeals.

either to abandon their integration efforts or to emulate those other housing professionals who have undertaken similar measures surreptitiously. The lingering uncertainty that will surround the proper construction of the Fair Housing Act if this Court denies review here may well adversely affect important housing decisions, while the lower federal courts grapple with the detailed factual disputes likely to be raised in future litigation of this kind. The negative consequences of delaying this Court's intervention will far outweigh any conceivable benefit that may be derived from one or two more appellate opinions on the subject prior to review in this Court.

C. The Potential Effect of the Court of Appeals' Decision on Starrett City Itself Is Sufficiently Significant to Warrant This Court's Attention.

The residents of Starrett City are, of course, principally concerned with the effect of the court of appeals' decision on the development that they call their home. The people who live there do not wish to idealize Starrett City; like any place else, it is not perfect. But Starrett City has been and remains a good place to live, a place where low-to-moderate income families can find decent and affordable housing with good schools and a low crime rate. In large measure, *amici* submit, the virtues of Starrett City as a place to live are attributable to its integrated character. That is why *amici* are so concerned by the decision below.

It is worth stressing, because the court of appeals' decision barely takes note of the fact, that integration at Starrett City is no mere token. As of March 31, 1986, 63% of Starrett City's apartments were rented to whites, 22% were rented to blacks, 8% were rented to Hispanics, and 5% were rented to orientals (Pet. App. K-23). Moreover, according to the 1980 census, the racial composition of Starrett City by population was approximately

55% white and 45% minority. The population figures reflected in the 1980 census remain approximately accurate today, except that the percentage of minority tenants has probably increased slightly due to a small increase in the percentage of Starrett City units occupied by blacks (Pet. App. K-23 to K-24). Not only do minorities constitute a very substantial percentage of Starrett City's population, but the current racial mix at Starrett City very closely approximates the racial mix in Starrett City's market area, the area from which Starrett City draws most of its tenants (Pet. App. K-98 to K-99).

All of these facts are undisputed. All of them were included in petitioners' Statement of Undisputed Material Facts in the district court (A00347), and none of them was challenged by the government. Likewise uncontested is the fundamental fact that Starrett City's rental practices "have been adopted solely to achieve and maintain integration and are not motivated by any racial animus" (A00347-8; Pet. App. K-3 to K-4). Starrett City has never sought to limit minorities to some trivial number of apartments in an enormous housing development. Rather, minority residents are today, and have been from the very beginning of the rental process at Starrett City, a major part of the development's population.

Moreover, Starrett City's rental practices do not *exclude* anyone. Unlike other race-conscious measures that apportion scarce goods, such as the race-conscious distribution of public funds sustained in *Fullilove*, Starrett City's efforts to preserve integration do not restrict eligibility for benefits at all. No one is denied an apartment at Starrett City based on race. The average time on the waiting list is longer for minority applicants, but any qualified applicant, regardless of race, is fully eligible to apply for and obtain any apartment at the development.

The substantial minority participation at Starrett City over a period of nearly 15 years accounts for the consid-

erable *amicus* support that petitioners have attracted in this litigation. Starrett City's petition for rehearing in the court of appeals was supported not only by the Starrett City Tenants Association and the other *amici* filing this brief, but also by three members of Congress from New York, four members of the New York State legislature, the Borough Presidents of Brooklyn and the Bronx, the NAACP New York State Conference, the State Human Rights Advisory Council, National Neighbors, and other individuals and groups favoring integrated housing.

Integration at Starrett City is not only an essential part of the development's character, but it is a major reason for the development's attractiveness to prospective tenants. One of the sad ironies of the government's position in this litigation is that is seeks to destroy the very feature of Starrett City that has created the substantial demand that now exists for apartments there. The government purports to be assisting minority applicants on the Starrett City waiting list. But those applicants have brought and settled their own lawsuit, without assistance from the government. They have agreed that Starrett City's rental practices should be left unchanged. If the government prevails in this case and the lower court's decision is allowed to stand, it may well be that the waiting list for which the government expresses such solicitude will dwindle and eventually disappear. For once Starrett City has become a segregated minority project—a result that all agree is inevitable under the court of appeals' ruling—Starrett City will no longer be the attraction it is today for potential residents, black or white.

Although the courts below have ignored the point, the available evidence shows a dramatic contrast between the social characteristics and "quality of life" at Starrett City and at other comparable developments that have

experienced rapid transitions to segregated minority developments. The precise causal explanation for these differences can be left to the sociologists, urban planners, economists, and politicians. The salient fact as far as the people who live at Starrett City are concerned is that comparable housing developments have become far less desirable places to live, in tangible as well as intangible ways, following a change to segregated minority status.

In the words of Dr. Kenneth Clark, one of the expert witnesses who submitted an affidavit in support of Starrett City in the district court, "[p]ast experience with integrated communities that have become segregated minority communities shows that such transformations are often accompanied or followed by a noticeable deterioration in the quality of life, as measured by any of several criteria" (Pet. App. K-61). After conducting a detailed study of attitudes among black residents of Starrett City, Dr. Clark reported that "a great preponderance of blacks at Starrett City strongly desire residential integration" (Pet. App. K-57). He explained that the observed decline of housing developments that have experienced a rapid transition from integration to segregation is attributable to the attitudes of black as well as white residents. In Dr. Clark's words (Pet. App. K-61 to K-62),

> [u]pwardly mobile blacks know the value of an integrated neighborhood and tend to seek housing elsewhere when a neighborhood goes through racial transition. The result is racial and economic ghettoization; for the resegregated communities consist primarily of less educated, lower income blacks, who have a greater propensity for social instability. This is often reflected by increased violence and higher crime.

Dr. Clark concluded that "segregated residential communities can never be the true equal of integrated communities and can never provide the benefits to be derived

from a community in which persons of different racial and ethnic backgrounds live together in harmony and cooperation" (Pet. App. K-62).

Detailed evidence supporting Dr. Clark's views can be found in the affidavit of Oscar Newman, another of Starrett City's expert witnesses in the district court, and now the district court's own expert in the implementation of the desegregation orders recently upheld in *United States* v. *Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988). *See* Pet. App. K-76 to K-77, K-87 to K-98. Newman examined four public housing projects near Starrett City; two developments of comparable size to Starrett City but located in Queens, approximately five miles from Starrett City; one higher-income private apartment development across the street from Starrett City; and one higher-income rental development of approximately 1,500 units located a little more than a mile from Starrett City, on the Brooklyn-Queens border. As Newman has documented, although the details vary to some extent from development to development, all of these developments underwent sharp racial transformations in the 1970's. All are now overwhelmingly minority.

Newman investigated a variety of specific subjects, including (i) crime; (ii) "skips" and evictions;[3] (iii) school performance; and (iv) physical conditions. Although differences in the available data precluded Newman from making every comparison with every housing development, the overall result of his inquiry was clear. The picture at Starrett City is more favorable than that at the other developments, under virtually every criterion considered.

Some of the data gathered by Newman on comparative school performance are particularly striking. These data, which are reproduced in the Newman affidavit (Pet. App.

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[3] To "skip" means to move out of an apartment without paying rent already due.

K-92 to K-94), involve not a comparison with another particular housing development but rather a comparison between the public elementary school at Starrett City and the nearest neighboring school. The data show that black students at Public School 346, the elementary school at Starrett City (26.8% black, 22.4% Hispanic, 39.9% white, and 10.9% other), have performed substantially better than black students at Public School 306, a socio-economically similar but virtually all-minority elementary school a few blocks from Starrett City (81.2% black, 18.2% Hispanic, 0.5% white, and 0.3% other). Both schools are under the supervision of the same community school district. The consistent and substantial differences in achievement demonstrate that it is not just the white and oriental students at Starrett City who are raising the average performance level there but that the black students at Starrett City are also benefiting significantly from the integrated educational environment provided both in the schools and in the development as a whole.

The positive influence of Starrett City has been felt outside, as well as within, the development's borders. Starrett City's presence for more than a decade as a stable anchor on the southern edge of East New York has contributed to—indeed, may well have served as a catalyst for—the neighborhood's revitalization. The area immediately north of Starrett City now contains numerous new businesses, and there are several examples of new or renovated housing replacing abandoned or boarded-up stores and houses. The success of Starrett City has helped to encourage this redevelopment and to arrest the deterioration of East New York (Pet. App. K-2).

For all these reasons, *amici* believe that Starrett City itself is sufficiently important to warrant the Court's attention. The highly dubious legal ruling by the divided panel below should not be permitted, without this Court's

review, to alter irretrievably the character of a model community of some 17,000 residents.

D. Review Is Warranted Because Successful Integration Like That at Starrett City Will Encourage the Construction of Additional Needed Subsidized Housing.

A final reason that this case merits review is that the success of integrated subsidized housing such as Starrett City breeds new opportunity to satisfy the housing needs of persons of low-to-moderate income. As Starrett City's expert witness Oscar Newman has said (Pet. App. K-86), with the success of Starrett City and other similar developments, more sites are likely to become available for integrated housing in adjacent white communities; more housing developers are likely to perceive the advantages and stability of investment in such developments; and more legislators are likely to perceive the utility of housing subsidies as a means of serving their constituents of all races (Pet. App. K-86). And, if an adequate supply of decent, integrated housing were available, there would be no question about our nation's ability to house minority applicants without sacrificing the integrated character of developments like Starrett City.

There is another, more troubling side of the coin. If the common perception of subsidized housing is that such housing inevitably will become segregated minority housing, political support for new publicly assisted housing is likely to be increasingly difficult to marshal. Newman's research suggests that this cause-and-effect relationship has been operative in New York since 1960 (Pet. App. K-85), and the sharp decline in publicly assisted housing starts throughout the nation during the last decade may well be a reflection of the same point.

Before Starrett City's prospects as a model for future integrated subsidized housing developments are discarded, this Court should grant review to determine whether the government's reading of the Fair Housing Act accords with Congress' intent in passing that statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 16, 1988

APPENDIX

In addition to the Starrett City Tenants Association, *amici* include the following organizations:

Hispanic Alliance, Inc. of Starrett City
The Onyx Corporation, Inc.
Youth Federation of Starrett City
Parent Teachers Association of Public School 346
Parent Teachers Association of
Intermediate School 364
Community Board #5
Voters League of Starrett City
Anchor Baptist Church
Christ Community Church
Starrett City Jewish Center
Golda Meir Chapter—B'nai B'rith Women
Jewish Community Council of
Starrett City Organization
Kiwanis Club of Spring Creek
Kiwanis Club of Jamaica Bay, Inc.
Starrett City Spring Creek Lions Club
Starrett City Boxing Club
Cancer Care, Inc.
United Leukemia Fund of Starrett City, Inc.
United Cerebral Palsy of New York City, Inc.
Deborah Hospital Foundation-Starrett City Chapter
Starrett City Volunteer Ambulance Corp.
Jewish Association for Services for the Aged
Jewish War Veterans Post 150
Starrett City Ladies Auxiliary #150
Girl Scouts of Greater New York—
Starrett City Chapter NB7
The Boy Scouts of America—Troop 121
Italian American Civil Rights League
Canarsie Neighborhood Development Corp., Inc.
Starrett City Landfill Committee